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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 379

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,

Appellants,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR RAILROAD APPELLANTS.

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INDEX.

	Page
Opinions Below	1
Questions Presented	2
Statutes Involved	2
Statement	3
Specification of Errors to Be Urged	13
Summary of Argument	14
Argument	21
I. The Interstate Commerce Commission, in Hearing and Deciding the Issues Raised in the Proceedings Before it, and Entering the Orders Enjoined by the District Court, Proceeded Pursuant to Authority Vested in it by Congress and in Discharge of the Administrative Duty Validly Imposed upon it to Prevent the Unnecessary Dissipation of the Carriers' revenues by the Establishment of Unduly Low Rates	21
(1) The Commission's Findings of Fact Show That the Proposed Reduced Rates were Ordered Canceled on the Ground that they were Less than Reasonable Minimum Rates	21
(2) The History of the Minimum Rate Power Shows that it was Expressly Sought by the Commission for the Primary Purpose of Dealing with Situations such as was Presented in This Case	24

Page

(3) This Court has Repeatedly Upheld the Commission's Minimum Rate Power over Intrastate Rates. It Should no Less Clearly be Upheld with Respect to the More Important Interstate Rates 26

(4) The Minimum Rate Power over Interstate Rates has been Upheld by Lower Courts. 31

II. There was Substantial Evidence to Support the Findings and Order of the Commission... 34

(1) The Commission's Findings that the proposed Reductions in Rates would Disrupt the Existing General Rate Structure and Result in a General Reduction in Rates Conceded to be already Abnormally low are Fully Supported by the Evidence... 34

(a) The History and Highly Competitive Nature of the Rate Structure Involved 35

(b) The Immediate Effect of the Milwaukee's Reductions in Rates is a Splitting of the Origin Groups 38

(c) The Milwaukee's Reductions in Rates Would Cause Corresponding Reductions in Rates from Other Groups in the Indiana Field 39

(d) The Milwaukee's Reductions in Rates Would Cause Corresponding Reductions in the Rates from the Illinois and Western Kentucky Fields..... 41

Page

(e) Reductions in Other Rates Which Would be Caused by the Reductions Made by the Milwaukee Could not be Confined to the Destinations to Which the Milwaukee's Rates Apply, but Would Spread to Other Destinations in the Same Territory, Including the Important Chicago District..... 49

(f) The Findings of the District Court are Directly Contrary to Those of the Commission on the Same Set of Facts and Cannot be Sustained..... 51

(2) The Commission's Finding that the Proposed Reductions Would Result in the Unnecessary Sacrifice of the Revenues of the Carriers in General is Fully Supported by the Evidence 54

(3) The Commission's Finding that the Then-Existing Rate Relationships had not Resulted in a Decreased Movement of Coal from the Indiana Groups to the Destinations Involved is Supported by Substantial Evidence. The Reductions in Rates Proposed by the Milwaukee were not Necessary to Enable it to Compete for the Coal Traffic of the Destination Territory and the Commission's Order Did Not Deprive the Milwaukee of its Right to Compete 57

III. The District Court Exceeded its Proper Authority and Judicial Function in Entering upon a Determination upon Conflicting Evidence of the Fact Questions Presented in the Case Before the Commission and Thus Usurped the Administrative Function of the Commission 62

Page

IV. The Commission's Order does not Unfairly Discriminate Against the Milwaukee and is not Arbitrary in that it Improperly Disregards the Distances from the Milwaukee's Mines 68

(1) The Commission's Order does not Discriminate Against the Milwaukee by Prohibiting it from Competing for the Traffic Involved and does not Constitute an Unwarranted Interference with the Milwaukee's Managerial Discretion with Respect to the Publication of Competitive Rates 68

(2) The Commission did not Arbitrarily Disregard the Distances from the Milwaukee Mines and did not Unjustly Require, the Cancellation of Rates Relatively Higher, Distance Considered, than the Rates in Which the Milwaukee was Compelled by the Illinois Commerce Commission to join with Other Railroads for the Movement of Coal from Illinois Mines to Destinations in Northern Illinois 72

CONCLUSION 77

APPENDIX 79

Citations.

Cases: Page No.

Alabama v. United States, 283 U. S. 776 28
Anchor Coal Co. v. United States, 25 F. (2d) 462 ..15, 31, 32
Claiborne Annapolis Ferry Co. v. United States, 285 U. S. 382 34
Florida v. United States, 292 U. S. 1 .....
.....14, 15, 17, 28, 32, 54, 63
Florida v. United States, 282 U. S. 194 45
Georgia Public Service Commission v. United States, 283 U. S. 765 28
Illinois Central Railroad Company v. Interstate Commerce Commission, 206 U. S. 441 34
Interstate Commerce Commission v. C. N. O. & T. P. Railway Company, 167 U. S. 479 .....14, 24
Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541 .....20, 76
Jefferson Island Salt Mining Co. v. United States, 6 F. (2d) 315 .....15, 19, 31, 32, 66, 71
Louisville & Nashville Railroad Company v. United States, 238 U. S. 111 .....20, 76
Manufacturers Ry. Co. v. United States, 246 U. S. 457 .....17, 63
Mississippi Valley Barge Line Company v. United States, 292 U. S. 282 .....19, 29, 71
New England Divisions Case, 261 U. S. 184 .....63, 17
Skinner & Eddy Corporation v. United States, 249 U. S. 557 .....14, 24
Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co., 270 U. S. 266 30
Texas & Pacific Railway Company v. United States, 289 U. S. 627 .....19, 69

United States v. Anchor Coal Company, 279 U. S. 812. 33
United States v. Illinois Central Railroad Company, 263 U. S. 515 ..... 18, 29, 69
United States v. Louisiana, 290 U. S. 70 ..... 15, 28
Western Paper Makers Chemical Company v. United States, 271 U. S. 268 ..... 17, 34, 63
Wisconsin Railroad Commission v. C. B. & Q. R. R. Co., 257 U. S. 563 ..... 14, 15, 27

Commission Cases:

A. T. & S. F. Ry. Co. v. Commerce Commission, 335 Ill. 70 43
Central Coal Producers' Assn. v. B. & O. R. R. Co., 196 I. C. C. 203 74
Coal from Indiana to Illinois, I. & S. Docket 3843, 200 I. C. C. 609 ..... 1, 2, 3
Corporation Commission of North Carolina v. Aberdeen & R. R. Co., 200 I. C. C. 571 74
Eau Claire Board of Trade v. C. M. & St. P. Ry. Co., 5 I. C. C. 264 25
Ex Lake Iron Ore from Chicago to Granite City, 123 I. C. C. 503 66
Illinois Coal Cases, 1920, 62 I. C. C. 741, 62 I. C. C. 741, 64 I. C. C. 751 ..... 6, 37
Illinois-Indiana Coal Cases, 128 I. C. C. 265 ..... 6, 38, 48
Intrastate Coal Rates to East St. Louis, 161 I. C. C. 371 74
Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537 ..... 7, 16, 42, 44, 46, 49, 55
Intrastate Rates on Bituminous Coal Within Ohio, 192 I. C. C. 413 ..... 35, 74
Lake Cargo Coal Cases, 1930, 181 I. C. C. 37 74
Royal Route Co. v. A. G. S. R. R. Co., 182 I. C. C. 85 ... 74
West Kentucky Coal Bureau v. Illinois Central Railroad Company, 172 I. C. C. 279 ..... 6, 38, 48

Annual Reports of the Interstate Commerce Commission:

Second Annual Report of Interstate Commerce Commission, 1888 24

Fourth Annual Report of Interstate Commerce Commission, 1890 24

Seventh Annual Report of Interstate Commerce Commission, 1893 24

Eighth Annual Report of Interstate Commerce Commission, 1894 24

Eleventh Annual Report of Interstate Commerce Commission, 1897 24

Thirty-third Annual Report of Interstate Commerce Commission, 1919 ..... 24, 25

Statutes:

Emergency Railroad Transportation Act, 1933... ..... 14, 28, 32, 54

Interstate Commerce Act:

Sec. 1 (5) 2, 11, 14, 15, 16, 20, 21, 22

Sec. 3 (1) 19, 70

Sec. 15 (1) 2, 11, 14, 15, 22, 26

Sec. 15 (7) 2, 4, 11, 14, 15, 22, 69

Sec. 15a (2) 2, 11, 13, 14, 15, 16, 20, 21, 22, 26, 28, 32, 54,,71

Sec. 13 (3) (4) 7, 15, 27

Transportation Act of 1920..... ..... 14, 15, 24, 26, 27, 28, 30, 33, 54, 69

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BRIEF FOR THE APPELLANT RAILROADS, ILLINOIS CENTRAL RAILROAD COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ALTON RAILROAD COMPANY, AND L. W. BALDWIN AND GUY A. THOMPSON TRUSTEES, OF THE MISSOURI PACIFIC RAILROAD COMPANY.

OPINIONS BELOW.

The opinion of the specially-constituted District Court (R. 48) has not been reported. The reports of the Intertsate Commerce Commission (R. 7, 34) *Coal From Indiana To Illinois,* are published in 197 I. C. C. 245 and 200 I. C. C. 609.

Questions Presented.

The principal question presented is the validity of an order of the Interstate Commerce Commission, issued November 8, 1933, by Division 2, in a proceeding entitled *Investigation and Suspension Docket 3843, Coal From Indiana To Illinois* (R. 12), subsequently affirmed by the entire Commission on April 18, 1934, upon argument and reconsideration (R. 48), the effect of which was to require the cancellation of certain reduced rates on bituminous coal published by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company to apply from mines on its railroad in the Brazil-Clinton and Linton-Sullivan groups in Indiana to Rockford, Freeport and other points on its road in northern Illinois.

Subordinate questions are: (1) whether proposed reduced rates which would precipitate a general reduction in a rate structure not unreasonably high and result in the unnecessary dissipation of the revenues of the carriers in general and impair their ability to render adequate and efficient transportation service are unlawful and can be prohibited by the Commission; (2) whether the Commission's order was supported by adequate findings of fact; (3) whether the findings upon which the Commission's order was based were supported by substantial evidence; and (4) whether the Commission's order was arbitrary and exceeded the authority conferred upon it by statute.

Statutes Involved.

The statutory provisions involved are Section 1 (5), Section 15(1), Section 15(7) and Section 15a(2) of the Interstate Commerce Act. (49 U. S. C. 1(5), 15(1), 15(7) and 15a(2)) and are set forth in the appendix to this brief.

Statement.

This is a direct appeal from the final decree of the specially-constituted District Court for the Northern District of Illinois permanently enjoining and restraining enforcement of an order of the Interstate Commerce Commission, issued November 8, 1933 by Division 2 of the Commission in a proceeding entitled "Investigation and Suspension Docket 3843, *Coal From Indiana To Illinois*" and affirmed by the entire Commission on April 18, 1934, upon argument and reconsideration. The order required the appellee, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter called the Milwaukee, to cancel certain rate schedules which it had filed with the Commission proposing to reduce its carload rates applicable to the transportation of bituminous coal from the mines on its line in the Brazil-Clinton and Linton-Sullivan origin groups in Indiana to Rockford and Freeport, Illinois, and certain intermediate points in the latter state. The schedules (R. 60-63) were filed to become effective December 23, 1932 and reduced the rate of $1.87 per ton from the Brazil-Clinton group to both Rockford and Freeport to $1.70 per ton, and the rate from the Linton-Sullivan group to both Rockford and Freeport of $1.92 per ton to $1.75 per ton, reductions of 17 cents per ton in each instance. The other destinations, all likewise located on the Milwaukee railroad, are intermediate to Rockford and Freeport and the origin groups. The rates to Rockford and Freeport were observed as maxima in the schedules carrying the proposed reductions and resulted in reductions in rates by lesser amounts to the intermediate destinations than to Rockford and Freeport. Protests against these reduced rates were filed with the Interstate Commerce Commission by various operators of mines in the Illinois coal field which sell coal at Rockford, Freeport and the other destinations in northern Illinois in competition with the mines on the Milwaukee in the Brazil-Clinton and

Linton-Sullivan groups and by other railroads engaged in the transportation of coal from other mines in the Indiana, Illinois and western Kentucky fields to Rockford, Freeport and the other destinations involved, including the appellant railroads on whose behalf this brief is filed. (R. 64, 67, 69, 73). Following these protests, the Commission, exercising the power conferred upon it by Section 15(7) of the Interstate Commerce Act (49 U. S. C. 15(7)), by order dated December 22, 1932 (R. 71) suspended the tariffs proposing the reduction until July 23, 1933, and by the same order entered upon a hearing concerning the lawfulness of the rates stated in the schedules. The effective date of the schedules was further postponed from time to time. The hearing referred to was held February 20, 21, 1933 (R. 73) and on November 8, 1933, Division 2 of the Commission issued its report and order (R. 7) finding the proposed reductions not justified and directing that the schedules be canceled on or before January 22, 1934, and the proceeding be discontinued. On January 2, 1934, the Milwaukee filed a petition for rehearing, reargument and reconsideration before the Commission and an extension of the effective date of the order. (R. 223)

The Commission, by order of January 5, 1934, postponed the effective date of the order of November 8, 1933 to February 22, 1934 (R. 230) and by an order of the same date (R. 231) denied the respondent Milwaukee's petition for rehearing, reargument and reconsideration. Thereafter, on February 14, 1934, the Milwaukee filed a petition in the United States District Court for the Northern District of Illinois (R. 1) seeking to enjoin the enforcement of the order of November 8, 1933. That petition was to have been heard on February 21, 1934, but hearing was postponed from time to time until April 20, 1934. The Commission, by order of February 20, 1934, further postponed until April 23, 1934, the effective date of the outstanding order

of November 8, 1933. On March 7, 1934, the Commission reopened the proceeding for argument before the full Commission, which was had, and on April 18, 1934, the full Commission issued its report and order on argument and reconsideration affirming the prior report and order of Division of November 8, 1933. The report of the full Commission on argument and reconsideration of April 18, 1934, was filed in the proceedings in the District Court by the Interstate Commerce Commission as Appendix I to its answer therein. (R. 34) The railroad appellants upon whose behalf this brief is filed intervened as defendants in the suit in the District Court to set aside the Commission's order (R. 20, 24).

Hearing on both the application for an interlocutory injunction and the application for a permanent injunction was had before the specially-constituted District Court on April 20, 1934, at which the plaintiff below, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, introduced a certified copy of the record and transcript of the proceedings before the Interstate Commerce Commission. The District Court, by order of the same date, granted an interlocutory injunction (R. 29) under the protection of which the reduced rates went into effect on April 23, 1934.

On June 13, 1934, the District Court in a memorandum opinion accompanied by formal findings of fact and conclusions of law (R. 48) held that the order of the Commission was not supported by substantial evidence and on June 21, 1934 (R. 56) entered its final degree permanently enjoining the enforcement of the Commission's order of November 8, 1933 as reaffirmed on April 18, 1934. The reduced rates have remained in effect under the protection of the final decree. An appeal from this final decree to this court was duly taken by the United States, the Interstate Commerce Commission and the railroad appellants.

The report of the Commission of April 18, 1934 on argu-

ment and reconsideration (R. 34) is a report of the full Commission and shows upon its face that it has been prepared with unusual care. The evidence is summarized and the findings of fact upon which the Commission's order of November 8, 1933, as affirmed by the full Commission on April 18, 1934, was based, are set out. The Commission pointed out that the coal rates throughtout the Indiana-Illinois territory had been found by it in other proceedings to be on a very low level due to intense carrier and commercial competition (R. 42) and that the witness for the Milwaukee frankly stated (R. 37) that the Milwaukee did not contend that the rates it proposed to reduce from its mines in Indiana were in excess of reasonable rates but further frankly conceded that as a matter of fact they were less than reasonable maximum rates as were all the rates from Illinois, Indiana and western Kentucky measured by any test evolved by the Commission in recent years.

The Commission explained (R. 35) that the mines in Illinois and western Kentucky had been grouped for rate making purposes and that the rates from the various groups to the territory in northern Illinois here involved bear differential relationships which are generally in conformity with the findings of the Commission in an earlier decision, *Illinois Coal Cases, 1920,* 62 I. C. C. 741 and 64 I. C. C. 751. The rates from the mines in western Kentucky, which have been thrown into a single group for rate making purposes, bear a relationship of 35 cents over the rates from the base, or southern Illinois group, in the Illinois field which was prescribed by the Commission in *Illinois Indiana Coal Cases,* 128 I. C. C. 265 and recently affirmed in *Western Kentucky Coal Bureau* v. *Illinois Central Railroad Company,* 172 I. C. C. 279. The Commission further pointed out that the mines in the Indiana field have likewise been grouped for rate making purposes and that the rates from the various groups to the territory in northern Illinois here

involved bear fixed differential relationships which have been voluntarily established by the carriers, including the Milwaukee. (R. 40) The rates from the various Indiana groups are closely related to the rates from the Illinois groups but in general the relationships of the rates from the Indiana groups to each other and to the rates from the Illinois groups have not been fixed by the Commission (R. 35). The locations of these groups are shown in a map Exhibit 5 (opposite page 148 of the printed record).

The Commission went into the history of the Indiana-Illinois rates reciting (R. 35) that prior to 1930 the coal rates from the Springfield group in Illinois and the Brazil-Clinton group in Indiana to the destinations here considered were maintained on a parity, with the rates from both groups 30 cents under the rates from the southern Illinois group. The rates from the other Indiana groups were on the established differentials over the northermost, or Brazil-Clinton group, which is the base group in Indiana. On August 20, 1930, by order of the Illinois Commerce Commission, the intrastate rates from the southern Illinois and Springfield groups, among others, were reduced 17 cents a ton. Subsequent to the reduction in the Illinois intrastate rates by the Illinois Commission the principal Illinois carriers, including the Milwaukee, filed a complaint with the Interstate Commerce Commission alleging that the reduced rates prescribed by the Illinois Commission were in violation of Section 13 of the Interstate Commerce Act in that they were unduly prejudicial to persons and localities in interstate commerce and unjustly discriminatory against interstate commerce. The Interstate Commerce Commission instituted an investigation and after full hearing found in its report in *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, that the rates from mines in Illinois to Rockford and Freeport should not be found unlawful under Section 13 of the act until and unless

the interstate rates from the Indiana groups to the same destinations were increased to a level more nearly commensurate with the general level of rates on coal in that territory (R. 36). In other words, although the Commission found that the rates from the Illinois mines to Rockford and Freeport prescribed by the Illinois Commerce Commission were unduly low, the rates from the Indiana mines, which the Milwaukee proposed to reduce in the instant proceeding, were likewise unduly low and there was not such a disparity in their relationships as would authorize the Commission to require an increase in the Illinois intrastate rates under the thirteenth section. The relationships between the interstate and intrastate rates which the Commission there found not unlawful were the relationships which the Milwaukee's proposed reductions would disrupt.

In addition to the highly competitive nature of the coal rate adjustment involved and its history, which alone show that reductions cannot be made in the rates from one group without precipitating reductions in the rates from the other groups, there was testimony of competent witnesses thoroughly familiar with the rate adjustment and its history, that if the reductions proposed by the Milwaukee should be permitted they would result in corresponding reductions in the rates from the other groups, with the net result of no advantage to the Milwaukee and a substantial loss in revenue to the carriers in general. An excerpt from the testimony of one of these witnesses to that effect was set out in the report of the full Commission (R. 41) and was relied upon by the Commission, as the report indicates. The District Court held in its memorandum opinion (R. 51) that this testimony was not entitled to much weight as evidence. This constitutes an express weighing of the testimony which this court has repeatedly held is not within the province of the court when determining whether findings

and orders of the Commission are supported by substantial evidence. The District Court further held (R. 51) that the finding of the Commission with respect to the effect of the proposed reduced rates on the general rate structure appeared to be based solely on such expressions as to the future effect of the proposed rates of the Milwaukee, erroneously ignoring the highly competitive nature of the rate adjustment and its history, which the Commission so carefully set out in its report.

The full Commission made findings in its report: (1) that the immediate effect of the proposed reductions of the Milwaukee (applying as they did from only some of the mines in the Brazil-Clinton and Linton-Sullivan groups (Exhibit 8, R. 149)), would be a splitting of those groups (R. 44); (2) that there was a likelihood of the extension of any reductions from the Milwaukee mines to the mines on other lines in the Brazil-Clinton and Linton-Sullivan groups (R. 44); (3) that reductions in the rates from the Brazil-Clinton and Linton-Sullivan groups would disrupt the differential relations existing as between those groups and the other Indiana groups with the probability of mines and carriers in such other groups seeking similar reductions (R. 44); (4) that the reductions which would follow if the reductions proposed by the Milwaukee were permitted could not be confined to the Indiana field but would probably lead to further reductions in the Illinois intrastate rates with like reductions in the rates from the western Kentucky group for the purpose of preserving the relationship between western Kentucky and Illinois prescribed by the Commission (R. 44); and (5) that the reductions which would probably result from the reductions made by the Milwaukee could not be confined to the destinations to which the Milwaukee rates applied but would jeopardize the rates to the surrounding territory, including the important Chicago district (R. 43).

Summarizing its findings the full Commission found (R. 44):

> "The reductions here proposed if permitted to become effective would result in a level of rates from the Indiana groups lower than that which we stated, in the Illinois case, to be well below the reasonable level of rates in this territory, and would probably lead to further reductions in the Illinois intrastate rates with like reductions in the rates from western Kentucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by us, thus needlessly sacrificing the carriers' revenues and impairing their ability to render adequate and efficient railway transportation service."

At the conclusion of its report the full Commission found (R. 46):

> "We find that the proposed rates, if permitted to become effective, would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long standing rate relation existing for competitive purposes, between the several Indiana groups.
>
> We find that the proposed rates would be unreasonable and in violation of sections 1(5) and 15a(2) of the act."

As indicating the probable effect of the proposals on the revenues of the carriers in general the Commission pointed out that, based on a coal tonnage to Rockford alone from the Illinois, Indiana and western Kentucky fields, as shown in an exhibit of record (Exhibit 43, R. 217) a 17 cent reduction would result in an annual revenue loss to the carriers approximating $48,600.00 and that should the rates to Chicago be reduced to the level of the rates to Rockford the net annual revenue loss to the carriers, based on the

tonnage of recent years referred to in the Illinois case, would exceed $1,400,000.00.

Upon the findings to which we have referred the Commission felt constrained, in view of the minimum rate powers conferred upon it under Section 1(5) and Section 15(1)(7) of the Act and the duty imposed under Section 15a(2), to prevent the disruption of an already abnormally low rate structure and the bringing about of a generally lower level of rates which would needlessly sacrifice the carriers' revenues and impair their ability to render adequate service, and ordered the cancellation of the Milwaukee's schedules. It will be shown that such an order was within the authority conferred upon the Commission under the Commerce Act and constituted a valid exercise of that authority in this case. The evidence in support of the findings of the Commission will be discussed in detail in the following sections of this brief in which it will be shown that the full Commission correctly stated (R. 42):

> "In fact, it would be difficult to conceive of a proposal more likely to precipitate unwarranted changes in a keenly competitive rate structure than that here proposed."

Upon this same record the District Court found that the Commission's findings and order were not supported by substantial evidence. Such a conclusion was reached only by the ignoring of substantial evidence on the part of the District Court and by expressly giving less weight to other evidence than was assigned to it by the Commission. This court has characterized the Commission as an expert body informed by experience and has repeatedly held its orders are not to be set aside if supported by substantial evidence, and that it is not within the province of the court to weigh the evidence. The failure of the District Court to observe this cardinal rule and the substitution of its judgment for that of the Commission can alone account for its opinion in this case and its decree permanently enjoining enforce-

ment of the Commission's order. To sustain the District Court would be to permit rate relationships and ultimately the level of the rates on one of the most important commodities subject to transportation, both from a tonnage and revenue standpoint, to be determined by the carriers under the protection of the court rather than by the Commission pursuant to the duty laid upon it to preserve the revenues of the carriers and insure an adequate national transportation system.

SPECIFICATION OF ERRORS TO BE URGED.

The District Court erred:

1. In deciding that the order of the Interstate Commerce Commission of November 8, 1933, as affirmed April 18, 1934, is not supported by substantial evidence.

2. In deciding that there was no substantial evidence in the record to justify a finding by the Interstate Commerce Commission that the rates proposed were unlawful and in violation of the Interstate Commerce Act.

3. In holding and deciding that there is nothing in Section 15a(2) of the Interstate Commerce Act, as amended by the Emergency Railroad Transportation Act, 1933, "authorizing the Commission to establish rates above a reasonable minimum for one railroad merely to enable another railroad in the group not so well situated, to earn a fair return, even if the Act of 1920 did so provide."

4. In exceeding its proper judicial authority and function in entering upon a determination, upon conflicting evidence, of the fact questions presented before the Commission thus usurping the administrative functions of the Commission and in substituting its judgment for that of the Commission.

5. In deciding that the order of the Commission was unfair and discriminated against the plaintiff below, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

SUMMARY OF ARGUMENT.

I.

The proposed reduced rates ordered canceled by the Commission in this proceeding were found by the Commission to be unlawful in that they were in violation of Section 1(5) and Section 15a(2) of the Interstate Commerce Act. Section 1(5) requires all rates to be just and reasonable. It was recognized prior to the passage of the Transportation Act of 1920 that a rate could be unreasonable because it was too low as well as because it was too high. *Interstate Commerce Commission* v. *C. N. O. & T. P. Railway Company,* 167 U. S. 479, 511, but the Commission did not have the power to condemn rates because unreasonably low in violation of Section 1(5) prior to the passage of that act. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 565. Since the amendment of Section 15(1) by the Transportation Act of 1920, giving the Commission the power to prescribe minimum rates, the Commission has the power to require the cancellation of rates unreasonably low in violation of Section 1(5). Section 15a(2) as enacted in the Transportation Act of 1920 imposed upon the Commission the duty to conserve the revenues of the carriers and to fix rates and take other important steps to maintain an adequate railway service for the people of the United States. *Wisconsin Railroad Commission* v. *C. B. & Q. Ry. Co.* 257 U. S. 563. The amendment of Section 15a(2) by the Emergency Railroad Transportation Act of 1933 in nowise diminished the duty of the Commission to conserve the carriers' revenues but on the contrary by its express terms emphasized the carriers' need of adequate revenues. *Florida* v. *United States,* 292 U. S. 1. Proposed reduced rates which would precipitate a general reduction in a rate structure not

unreasonably high and result in the unnecessary dissipation of the revenues of the carriers in general and impair their ability to render adequate and efficient transportation service are in violation of Section 15a(2) of the Act and of Section 1(5) of the Act construed in the light of Section 15a(2) and Section 15(1), and can be prohibited by the Commission from going into effect under the powers of investigation and suspension conferred by Section 15(7) of the Act.

The annual reports of the Interstate Commerce Commission, prior to the passage of the Transportation Act of 1920, show that it sought the minimum rate power for the purpose of enabling it to deal with such a situation as was presented to it by the reductions in rates proposed by the Milwaukee in this case.

This court has upheld the minimum rate power of the Commission over intrastate rates under Section 13(3) (4) of the Act conferred by the Transportation Act of 1920 where exercised on account of revenue considerations. *Wisconsin Railroad Commission* v. *C. B. & Q. Ry. Co.* 257 U. S. 563; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, 292 U. S. 1. It should no less clearly be upheld with respect to the interstate rates which are of far more importance to the maintenance of an adequate national transportation system.

The minimum rate power over interstate rates has been upheld by lower federal courts in *Jefferson Island Salt Mining Company* v. *United States*, 6 Fed. (2d) 315 and *Anchor Coal Company* v. *United States*, 25 Fed. (2d) 462.

II.

The principal ground upon which the District Court enjoined enforcement of the Commission's order was that the findings and order were not supported by substantial evidence. This conclusion of the District Court was in error. Both the ultimate finding of the Commission that the proposed reduced rates were unlawful in violation of Section 1(5) and Section 15a(2) of the Act and the supporting findings of fact made in the Commission's reports are fully supported by the evidence. The Commission's findings that the proposed rates would lead to a disruption of the general rate structure on coal in Indiana and related areas, which the Milwaukee conceded and the Commission found was not unreasonably high, and would bring about a generally lower level of rates in that territory, was supported by the history of the rate adjustment which demonstrated its highly competitive nature and the impossibility of changing certain rates in the adjustment without affecting other rates and relationships. The relationship between the rates from the Indiana groups and the Illinois groups which the Milwaukee's proposal would disrupt was the relationship which the Commission had previously found not unlawful in a prior proceeding, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537. Aside from the history of the adjustment there was specific testimony of witnesses familiar with the rate adjustment that the Milwaukee's proposed rates would disrupt the existing general rate structure and bring about a general reduction of rates in this territory already unduly low.

The Commission's subordinate findings of fact that the Milwaukee's proposals would split the Brazil-Clinton and Linton-Sullivan origin groups, bring about like reductions in rates in those groups and ultimately spread to the other

competing groups in Indiana, Illinois and western Kentucky, were fully supported by the evidence. The Commission's further finding that the reductions which would be precipitated by the Milwaukee's reduced rates could not be confined to the destinations to which the Milwaukee's rates applied but would spread to other destinations in the same territory, including the important Chicago district, was likewise fully supported by the evidence.

The Commission's finding that the reductions which would be precipitated by the proposed reduced rates of the Milwaukee would result in an unnecessary and serious dissipation of the carriers' revenues and impair their ability to render adequate transportation service was fully supported by the evidence.

The Commission's finding that the rate relationships which the Milwaukee's proposed reduced rates would disrupt had not brought about a decrease in the movement of coal from the Indiana groups via the Milwaukee to the destination territory involved, was fully supported by the exhibit of record referred to in the Commission's report, which constituted the only specific evidence of the movement of coal under the rates involved, and was further supported by the oral testimony of the witnesses.

III.

It is the settled rule of law that it is not within the province of the court to weigh the testimony or substitute its judgment for that of the Commission. *Manufacturers Railway Company* v. *United States,* 246 U. S. 457, 482; *New England Divisions Case,* 261 U. S. 184; *Western Paper Makers Chemical Company* v. *United States,* 271 U. S. 268; *Florida* v. *United States,* 292 U. S. 1. The decision of the specially-constituted District Court can be explained only

on the assumption that the court did weigh the testimony and substitute its judgment for that of the Commission. The District Court expressly assigned less weight to the opinion testimony of a competent witness, which was quoted from in the report of the Commission, than did the Commission in arriving at its conclusions. In addition to assigning less weight to certain testimony than did the Commission the District Court ignored other important evidence expressly relied upon by the Commission, such as the history and highly competitive nature of the rate adjustment, the fact it was conceded to be unduly low and was so found by the Commission, and movements under the then-existing rates which showed that the Milwaukee was competing freely under the rate relationships it was endeavoring to change to its further advantage. The general effect of sustaining the decision of the District Court would be to permit rate relationships and ultimately the level of rates to be determined by the carriers under the protection of the court rather than by the Commission as the law provides.

IV.

The District Court's finding that the Commission's order was unfair and discriminated against the Milwaukee was in error. The Commission's order did not discriminate against the Milwaukee by prohibiting it from competing for the traffic involved. The evidence showed that the Milwaukee was competing freely under the then-existing rates. Nor did the order of the Commission requiring the cancellation of the proposed reduced rates constitute an undue interference with the Milwaukee's managerial discretion with respect to the publication of competitive rates. The right of a carrier to initiate rates is not absolute but is subject to the Commission's regulation and control. *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515.

The case cited by the District Court, *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, did not involve the minimum rate power but was decided under Section 3 of the Act. Whether a rate is compensatory for the service rendered is not the only test of minimum reasonableness. *Jefferson Island Salt Mining Company* v. *United States*, 6 Fed. (2) 315; *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282.

The Commission's order was not arbitrary and did not discriminate against the Milwaukee in that it improperly disregarded the distances from the mines on the Milwaukee alone or required the Milwaukee to cancel rates which were lower, distance considered, than rates from mines in Illinois in which it had been compelled to join by the Illinois Commerce Commission. The rates which the Milwaukee proposed to reduce had long been group rates. The Commission properly so treated them and took into consideration the average distances from all points in the origin groups. The Commission correctly held that the consideration of point to point distances alone in a group rate adjustment would tend to destroy all groupings and could not be adopted. The Milwaukee's contention that the Commission's order required it to cancel rates relatively higher than rates from mines in Illinois in which the Illinois Commerce Commission required it to join was not disregarded by the Commission but was specifically referred by the Commission, which pointed out that if distances from only the mines on individual lines were to be considered, there were comparisons unfavorable to the Milwaukee's proposed rates as well as the favorable comparisons to which the Milwaukee directed attention. Furthermore, the record in this case demonstrated, and the witness for the Indiana operators testified, that the rates on coal in this territory had not been made on distance alone and could not be so made. Competition is one of the important elements which

cannot be ignored. This court itself has recognized that distance is only one element to be considered in the fixing of rates. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 551; *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 111. The Commission's report shows on its face that it has given every consideration to the element of distance to which it is entitled in this highly competitive group rate adjustment.

V.

The Commission's ultimate findings of fact that the proposed rates were unlawful in violation of Section 1(5) and Section 15a(2) of the Act are fully supported by the subordinate findings of fact in the Commission's reports, which are in turn fully supported by the evidence. The order of the Commission requiring the cancellation of the proposed rates constituted a valid exercise of its power in this proceeding. The decree of the court below restraining the enforcement of the Commission's order should be reversed.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION, IN HEARING AND DECIDING THE ISSUES RAISED IN THE PROCEEDINGS BEFORE IT, AND ENTERING THE ORDERS ENJOINED BY THE DISTRICT COURT, PROCEEDED PURSUANT TO AUTHORITY VESTED IN IT BY CONGRESS AND IN DISCHARGE OF THE ADMINISTRATIVE DUTY VALIDITY IMPOSED UPON IT TO PREVENT THE UNNECESSARY DISSIPATION OF THE CARRIERS' REVENUES BY THE ESTABLISHMENT OF UNDULY LOW RATES.

1. THE COMMISSION'S FINDINGS OF FACT SHOW THAT THE PROPOSED REDUCED RATES WERE ORDERED CANCELLED ON THE GROUND THAT THEY WERE LESS THAN REASONABLE MINIMUM RATES.

The Commission's ultimate finding that the proposed reduced rates of the Milwaukee were unlawful is thus stated in the report of the full Commission of April 18, 1934, 200 I. C. C. 609, 622 (R. 47):

> "We find that the proposed rates would be unreasonable and in violation of sections 1(5) and 15a(2) of the act."

Section 1(5) of the Commerce Act (49 U. S. C. 1(5)) reproduced in the appendix of this brief, page 79, requires all charges for services rendered by the carriers subject to the Act in the transportation of passengers or property to be just and reasonable and declares that every unjust and unreasonable charge is unlawful and prohibited. Section 15a(2) of the Act (49 U. S. C. 15a(2)), reproduced in the appendix, page 81, provides:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on

> the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."

The Commission is empowered in Section 15(1) of the Act (49 U. S. C. 15(1)), reproduced in the appendix, page 79, to prescribe both maximum and minimum rates.

The proceedings before the Commission here under review were under paragraph 7 of Section 15 of the Act (49 U. S. C. 15(7), reproduced in the appendix, page 80, in which the Commission is authorized to suspend the operation of any schedule stating a new individual or joint rate and to enter upon a hearing "concerning the lawfulness of such rate" and after such hearing to make "such order with reference thereto as would be proper in a proceeding initiated after it had become effective." If the Commission finds, after a full hearing, that a proposed new rate suspended by it under paragraph (7) of Section 15 of the Act is unlawful, it is clearly empowered to condemn that rate and require its cancellation. In the proceedings here under review the Commission has found that the proposed reduced rates of the Milwaukee were unlawful in that they were in violation of Sections 1(5) and 15a(2) of the Act and ordered their cancellation.

The Commission's findings in its reports show clearly that the proposed reduced rates were found unlawful and ordered canceled on the grounds that they were unreasonably low in violation of Section 1(5) of the Act, and would precipitate general reductions in the rates of other carriers resulting in the impairment of their revenues and their ability to provide adequate and efficient railway transportation service in violation of Section 15a(2) of the Act. Among such findings are the findings on page 621 of the

report of the full Commission of April 18, 1934 (R. 46), reading as follows:

> "We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; * * *"

and the finding on page 619 of the report of the full Commission of April 18, 1934 (R. 44), reading:

> "The reductions here proposed, if permitted to become effective, would result in a level of rates from the Indiana groups lower than that which we stated, in the *Illinois Case,* to be well below the reasonable level of rates in this territory, and would probably lead to further reductions in the Illinois intrastate rates with like reductions in the rates from western Kentucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by us, thus needlessly sacrificing the carriers' revenues and impairing their ability to render adequate and efficient railway transportation service."

There was no contention that the proposed rates of the Milwaukee were so low that they would not yield sufficient revenue to compensate it for its services in rendering transportation thereunder. No evidence on this point was presented before the Commission and no finding with respect to the compensatory character of the proposed rates was made. On the other hand, it was conceded by the Milwaukee (R. 74, 83, 90) and found by the Commission (R. 37, 42) that the then-existing rates were less than maximum reasonable rates, and, consequently, that the proposed reduced rates, 17 cents less than the then existing rates to the principal destinations, were well under maximum reasonable rates. One of the principal issues of law, therefore, is whether proposed reduced rates which would precipitate a general reduction in a rate structure not unrea-

sonably high and result in the unnecessary dissipation of the carriers' revenues and the impairment of their ability to render adequate and efficient transportation service are unlawful and can be prohibited by the Commission.

2. THE HISTORY OF THE MINIMUM RATE POWER SHOWS THAT IT WAS EXPRESSLY SOUGHT BY THE COMMISSION FOR THE PRIMARY PURPOSE OF DEALING WITH SITUATIONS SUCH AS WAS PRESENTED IN THIS CASE.

The Commission did not have the power to condemn rates because unreasonably low prior to the passage of the Transportation Act of 1920 (41 Stat. L. 456), *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 565, although long before that it had been recognized that a rate might be unreasonable because it was too low as well as because it was too high. *Interstate Commerce Commission* v. *C. N. O. & T. P. Railway Company,* 167 U. S. 479, 511. The Commission soon found in its administration of the Commerce Act that the lack of power to deal with rates because unreasonably low was a serious handicap, especially in coping with that particular form of discrimination brought about by an individual carrier's unwise and unwarranted upsetting of a reasonable rate adjustment for the purpose of furthering its own ends at the expense of others, and commented on this lack of power in its annual reports. Second Annual Report of the Interstate Commerce Commission, 1888, p. 19; Fourth Annual Report of the Interstate Commerce Commission, 1890, pp. 21-22; Seventh Annual Report of the Interstate Commerce Commission, 1893, pp. 38, 39, 78; Eighth Annual Report of the Interstate Commerce Commission, 1894 p. 78; Eleventh Annual Report of the Interstate Commerce Commission, 1897, p. 37; Thirty-Third Annual Report of the Interstate Commerce Commission, 1919, p. 4. In the Annual Report for 1893, the Commission recommended that it be granted

the minimum rate power and among the principal reasons therefor suggested (a) the prevention of a carrier from being deprived of revenue it ought to have, (b) the prevention of discrimination, and (c) the prevention of an unfair distribution of the burden of the cost of transportation. In the Annual Report for 1897, page 24, the Commission commented upon a case then recently before it, *Eau Claire Board of Trade* v. *C. M. & St. P. Ry. Co.*, 5 I. C. C. 264. The Commission had required the reduction of rates on lumber from Eau Claire, Wisconsin, to certain common markets on the ground that they were too high compared with the rates to those markets from Winona and La Crosse, Wisconsin. As soon as these reductions were made by the Milwaukee, which served Winona and La Crosse as well as Eau Claire, other lines which served Winona and La Crosse but did not serve Eau Claire made corresponding reductions in their rates, which restored the old prejudicial relationship. The Commission suggested that it be given the power to deal with such rates and prevent such unwarranted reductions.

Finally, in the year 1919, immediately before the termination of federal control and the return of the carriers to their private owners under conditions which made it obvious that far reaching changes in the theories and practices of railroad regulation were necessary, the Commission renewed its request for power to deal with rates that were unreasonably low. The Commission's Annual Report for the year 1919 contains, beginning on page 1, a statement made by Commissioner Clark of the prevailing views of the members of the Commission with respect to legislation and the program to which the Commission as a body gave its support. Among the suggestions for needed legislation the following appears on page 4 of the report:

> "The regulating tribunal should have authority to prescribe not only the maximum which the carrier may charge, but also the minimum. This power would re-

> strict an individual carrier from furthering its own ends at the expense of others by unwise and unwarranted upsetting of reasonable rate adjustments. If the rates and charges are by regulation confined within the reasonably narrow limits between the maximum and the minimum reasonable charges, no public interest can be injured by the carriers all maintaining charges within those limits."

It thus appears that the minimum rate power was expressly requested by the Commission for the purpose of dealing with such a situation as was presented to it in the proposed reductions by the Milwaukee of its rates on coal from its mines in the northern Indiana groups to Rockford and Freeport and the other destinations here involved.

Among the additional powers conferred upon the Commission by the Transportation Act of 1920 was the power to prescribe minimum rates (41 Stat. L. 456, 484-485). This was done by amending Section 15(1) of the Act. The Transportation Act of 1920 also added a new section to the Act, Section 15a (41 Stat. L. 488), which provided in paragraph 2 that the Commission in the exercise of its power to prescribe just and reasonable rates should initiate, modify, establish or adjust such rates so that the carriers should earn a fair return upon the aggregate value of their property held for and used in the transportation service. The duties imposed upon the Commission by this amendment were clearly impossible of fulfilment without the conferring of the power to prevent the establishment of unduly low rates.

3. THIS COURT HAS REPEATEDLY UPHELD THE COMMISSION'S MINIMUM RATE POWER OVER INTRASTATE RATES. IT SHOULD NO LESS CLEARLY BE UPHELD WITH RESPECT TO THE MORE IMPORTANT INTERSTATE RATES.

In addition to conferring upon the Commission the power to prescribe minimum interstate rates, Congress, in Section 416 of the Transportation Act of 1920 (41 Stat. L. 484), con-

ferred upon the Commission the power to prescribe minimum intrastate rates upon finding after full hearing that the intrastate rates caused undue prejudice to shippers or localities in interstate commerce or discrimination against interstate commerce. (Section 13(3)(4) of the Interstate Commerce Act) (49 U. S. C. 13(3)(4)). The Commission's power over intrastate rates under Section 13 has been hotly contested and many cases involving orders of the Commission prescribing minimum intrastate rates have reached this court. One of the earliest cases under the thirteenth section was *Wisconsin Railroad Commission* v. *C. B. & Q. Railroad Company*, 257 U. S. 563, involving intrastate passenger fares in Wisconsin. The radical departure of Congress from its prior legislative policies made in the Transportation Act of 1920 was thus summed up in the opinion, page 585:

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill."

The Commission's order was upheld by the court, page 589 of the opinion, on the single ground that the intrastate passenger rates prescribed by the Wisconsin Commission on a lower basis than the interstate rates would not contribute their fair share of revenue to the maintenance of the general transportation system and therefore discriminated

against interstate commerce, which discrimination the Commission had the power to remove. The Commission's minimum rate power over intrastate rates has been sustained by this court in numerous other cases, among which are *Georgia Public Service Commission* v. *United States,* 283 U. S. 765, *Alabama* v. *United States,* 283 U. S. 776, *United States* v. *Louisiana,* 290 U. S. 70, *Florida* v. *United States,* 292 U. S. 1. In the later case it was contended that the amendment of Section 15a(2) of the Commerce Act by the Emergency Transportation Act of 1933, (48 Stat. L. 220) had taken from the Commission the power to prescribe intrastate rates for the purpose of preventing revenue discrimination against interstate commerce. Section 15a(2) has been quoted. The court held that the substitution of the directions contained therein for the fair return provisions of Section 15a(2) as enacted in the Transportation Act of 1920, in nowise diminished the Commission's minimum rate power over intrastate rates, stating, page 606:

> "Neither the elimination of the group method of rate making, nor the substituted rule, suggests an intention to impair the Commission's authority over intrastate rates for the appropriate protection of interstate commerce. On the contrary, the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues. The Congress had provided authority to meet that need where inadequate intrastate rates caused unjust discrimination against interstate commerce. The Commission had exercised that authority. The Commission had not proposed the diminution of that authority. The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways. We conclude that the new rule of rate making left the power of the Commission under section 13(4) intact."

While these decisions deal with the intrastate rates, it is inconceivable that Congress intended to give the Commis-

sion less power over interstate rates which are of far greater importance in the maintenance of a general national transportation system.

The recent decision of this court in *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282, involved a minimum rate order of the Interstate Commerce Commission dealing with interstate rates and made in an investigation and suspension proceeding. The Commission's order was sustained. The minimum rate power was not challenged in that case but this court said, page 287 of the opinion:

> "The rates were not approved as the respondents had submitted them. For the 80,000 pound minimum they were found to be too low. Not till there had been an increase of four cents per 100 pounds did the schedule win approval. There was a sedulous endeavor to guard against a rate war that would end in mere oppression."

Although no other case directly involving the minimum rate power as applied to interstate rates has been before this court, there are expressions in several decisions which we believe clearly support our position that the Commission's power to prevent the unnecessary dissipation of the carriers' revenues by prohibiting unduly low interstate rates should be no less certainly upheld than its power to prevent unduly low intrastate rates.

In *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515, decided in 1924, this court upheld an order of the Commission requiring the removal of discrimination in interstate rates brought about by the maintenance of certain joint through rates on lumber from points on a short connecting line higher than the blanket rates from points on trunk lines within the same general territory. One of the grounds urged by the defendant railroad in support of its contention that the discrimination was not undue was that the lower rates from points on its own line were

for the purpose of developing or securing competitive traffic. The court said, page 525 of the opinion:

> "These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 218, 220; *Interstate Commerce Commission* v. *Alabama Midland Ry.,* 168 U. S. 144, 167, 175. In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need, *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.,* 257 U. S. 563; *New England Divisions Case,* 261 U. S. 184; and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable."

In *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.,* 270 U. S. 266, which dealt with the granting of a certificate of public convenience and necessity for an extension of a line of railroad which would invade an industrial district already served by other railroads protesting against the extension, the court said, referring to the Transportation Act of 1920, page 277:

> "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers, is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public, as well as in benefit;

> and that, when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things to avert such losses."

This language is equally applicable to the instant case.

4. THE MINIMUM RATE POWER OVER INTERSTATE RATE HAS BEEN UPHELD BY LOWER COURTS.

The minimum rate power over interstate rates has been passed upon by lower courts in two prior cases, *Jefferson Island Salt Mining Co.* v. *United States*, 6 F. (2d) 315, and *Anchor Coal Co.* v. *U. S.* 25 F. (2d) 462. In the former case the District Court for the Northern District of Ohio upheld an order of the Commission prescribing minimum rates on salt from competing mines to Chicago for the purpose of bringing to an end an unnecessary and destructive rate war which was dissipating the carriers' revenues and causing unjust discrimination among shippers. The opinion is carefully written and reviews many of the decisions of this court to which we have referred. In sustaining the order of the Commission, the court said with respect to the exercise of the minimum rate power, page 318:

> "In the present case, the evidence is ample that ruinous rate wars can only be avoided and a reasonable relationship between rates collected and service rendered can only be maintained by the power exercised by the Commission. If plaintiffs' contentions were sustained, it would cut the heart out of the 1920 amendments to the Interstate Commerce Act. The new objects and purposes to be accomplished, as summarized above, would be nullified. New section 15a would be read out of the act."

On page 319 the court said:

> "We agree with the Commission that no different

tests or standards are prescribed for the determination of a just and reasonable minimum rate than for a just and reasonable maximum rate, and that the minimum rate-making power would be ineffectual, if Congress intended that it should be used only in cases where the rate assailed had been proved with mathematical exactness to be less than the cost of service. Such a test is impracticable of application to specific rates on a single commodity. * * * It was not necessary that the Commission should first have found that the Detroit to Chicago rate, or the Louisiana to Chicago rate, was noncompensatory, in order that a higher minimum rate might be prescribed, if in fact, as the Commission was justified in finding, proper rate relationships between different carriers and localities could not otherwise be established, or ruinous rate wars, threatening the ability of the Commission to fix rates for the carriers as a whole or in groups, which would permit the earnings prescribed in Section 15a, could not otherwise be avoided."

The District Court undertook in its opinion in the instant case (R. 53) to distinguish *Jefferson Island Salt Mining Company* v. *United States, supra,* on the ground that that case was decided under Section 15a(2) of the act as it stood after the amendment of 1920 which was very considerably changed by the amendment of 1933. The effect of the amendment made by the Emergency Transportation Act of 1933 on the Commission's minimum rate powers has already been determined by this court in *Florida* v. *United States,* 292 U. S. 1, previously discussed, where it was held that the Commission's minimum rate powers over intrastate rates had been in nowise curtailed. There can be no distinction in principle between the effect of the amendment on the Commission's power over intrastate rates and its power over interstate rates. The lower court was clearly in error in distinguishing *Jefferson Island Salt Mining Company* v. *United States, supra,* from the instant proceeding.

In the other District Court case, *Anchor Coal Co.* v.

United States, 25 F. (2d) 462, the District Court for the Southern District of West Virginia held a minimum rate order of the Commission dealing with interstate rates void on other grounds, but, page 471 of the opinion, did not question the Commission's general power to prescribe minimum rates to prevent ruinous rate wars and to guarantee reasonable earnings, not only to the carier affected, but also to a competing carrier which may labor under a higher cost of doing business. An appeal from the decision of the District Court was taken to this court, but the case having become moot in the meantime due to changes in rates, the decree below was reversed and the case remanded with directions to dismiss the bill. *United States* v. *Anchor Coal Company*, 279 U. S. 812.

It is clear from the circumstances under which the minimum rate power was conferred upon the Commission in the Transportation Act of 1920, and the decisions construing the act, that the power was granted at the Commission's request for the primary purpose of restraining an individual carrier from furthering its own ends at the expense of other carriers by the unwise and unwarranted upsetting of a reasonable rate adjustment, and that the Commission is under the duty of preventing the consequent unnecessary dissipation of the carriers' revenues and the impairment of their ability to provide an adequate national transportation system. The order of the Commission here under review prohibiting the unwarranted reductions in rates proposed by the Milwaukee constitutes a valid exercise of the minimum rate power clearly conferred upon it in the Act as amended, and the Commission would have been remiss in its duty had it not undertaken to prevent the consequences which we shall show the record in this case clearly indicates would inevitably follow if the reduced rates of the Milwaukee, which have taken effect under the injunction of the lower court, were permitted to remain permanently in effect.

II.

THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS AND ORDER OF THE COMMISSION.

1. THE COMMISSION'S FINDINGS THAT THE PROPOSED REDUCTIONS IN RATES WOULD DISRUPT THE EXISTING GENERAL RATE STRUCTURE AND RESULT IN A GENERAL REDUCTION IN RATES CONCEDED TO BE ALREADY ABNORMALLY LOW ARE FULLY SUPPORTED BY THE EVIDENCE.

One of the principal grounds upon which the District Court enjoined the Commission's order was that the Commission's findings of fact were not supported by the evidence. It is too well settled to require discussion that the Commission's findings are conclusive if supported by substantial evidence. When the evidence is material and conflicting it is not the province of the court to pass upon its weight. *Illinois Central Railroad Company* v. *Interstate Commerce Commision,* 206 U. S. 441, 454, *Western Paper Makers Chemical Company* v. *United States,* 271 U. S. 268, 271, *Claiborne Annapolis Ferry Co.* v. *United States,* 285 U. S. 382, 392. We do not believe, however, that it is necessary to apply any such strict rule to the Commission's findings of fact in the case under review. The findings of fact are supported by the overwhelming weight of the evidence and not merely by the substantial evidence the law requires.

The general findings of the Commission as to the effect on the rate structure of the reductions in rates proposed by the Milwaukee have been indicated in the foregoing section of this brief dealing with the Commission's power to prevent the unnecessary sacrifice of revenue. The care and patience with which the Commission has reviewed the evidence and stated its findings of fact are plain.

(a) *The History and Highly Competitive Nature of the Rate Structure Involved.*

It is necessary to consider briefly the general rate structure itself and something of its history in order to understand the complete significance of the Milwaukee's reduced rates and the effect they would have on the general rate structure if permitted to remain in effect, before taking up the specific findings of the Commission bearing on the point under discussion.

The rates from mines on the Milwaukee in the Brazil-Clinton and Linton-Sullivan groups to Rockford, Freeport and intermediate points which the Milwaukee proposed to reduce are parts of the general adjustment of rates on coal from the Indiana, Illinois and western Kentucky fields to Indiana, Illinois and Wisconsin, and particularly to points in northern Illinois, including the important Chicago district. This general rate adjustment is one of the most highly competitive adjustments in the country. The intense competition among the carriers and the coal operators and the importance of the adjustment to consumers have given rise to repeated litigation with the result that the Commission has passed upon practically all of the important aspects of the adjustment in prior cases and is thoroughly familiar with the general situation. Several of the more important prior cases dealing with the adjustment are mentioned in the Commission's reports in this case and will be referred to in this section of the brief. This court has frequently characterized the Commission as an expert body informed by experience. This characterization is peculiarly apt with respect to matters pertaining to the coal rate adjustment here involved.

In a recent thirteenth section case, *Intrastate Rates on Bituminous Coal Within Ohio*, 192 I. C. C. 413, decided May 2, 1933, an effort was made to justify the low intrastate

rates in Ohio by comparisons with the rates in the Indiana-Illinois territory. The Commission's comments on the Indiana-Illinois adjustment are set out on page 617 of the report of the full Commission of April 18, 1934, (R. 42) and read in part as follows:

> "* * * It is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. This has greatly been brought about by a competitive condition differing from that in the Ohio territory, although some testimony was introduced to indicate that the actual operating conditions in Illinois are not more favorable than in Ohio. Chicago, in the Illinois territory, is the greatest coal market in this country, and * * * consumes annually 30,000,000 to 35,000,000 tons of coal. It was * * * stated that the rate level to Chicago is the result of keen competition between producers of eastern coal, moved both by rail and water-and-rail, and producers of Illinois and Indiana coals. Like competition also exists between carriers that have their own rails extending from particular groups in Illinois and Indiana to Chicago and whose principal interest is to move coal from their own mines. The rates to Chicago have had a depressing effect upon other rates on bituminous coal in this territory and have resulted in the establishment many years ago of a competitive basis of rates that is on a very low level."

It is submitted that the Commission was in a far better position to appreciate the effect of reductions in rates on the general adjustment than was the District Court.

The relationships of the rates from the various fields and from the various groups within each field are portrayed in many exhibits of record, of which Exhibit 40 (R. 215) is typical, and have been carefully set out in the Commission's reports. The mines in all of the fields have been grouped for rate making purposes for many years. The principal groups and their locations are shown on a map introduced as Exhibit 5 (Opposite page 148 of the printed record). The origin groupings and rate relationships in the Indiana

field are thus described on page 615 of the report of the full Commission (R. 40):

> "The coal-producing area in Indiana, consisting of several groups, extends southward from the Brazil-Clinton group (the so-called base group) to the Ohio River. The rates from the more-distant southern groups are based differentially over those from the Brazil-Clinton group. To the destinations here considered the rates from the Linton-Sullivan, Princeton, and Boonville groups are 5, 12, and 15 cents, respectively, higher than the rates from the Brazil-Clinton group. Stated otherwise, rates from the Linton-Sullivan group are 5 cents higher than rates from the Brazil-Clinton group; rates from the Princeton group are 7 cents higher than rates from the Linton-Sullivan group and rates from the Boonville group are 3 cents higher than the rates from the Princeton group. This differential relation has been voluntarily established by the carriers, including respondent herein, serving the Indiana groups. The proposed reductions would increase the above differentials of 12 and 15 cents from the Princeton and Boonville groups to 29 and 32 cents, respectively, over the Brazil-Clinton group."

The Illinois origin groupings and rate relationships are described on pages 610 and 614 of the report of the full Commission of April 18, 1934 (R. 35, 39). The principal Illinois groups involved are the Springfield and southern Illinois groups. Exhibit No. 43 (R. 217), which sets out the shipments of coal from the various groups to Rockford, the most important destination, for the years 1929 to 1932, inclusive, shows that the southern Illinois group is by far the largest shipping group in the Illinois field. It is the base group. The rates from the Springfield group are made 30 cents under the rates from the southern Illinois group. This rate relationship and the other Illinois group relationships are, as stated by the Commission, in conformity with the findings of the Commission in a prior case, *Illinois Coal Cases, 1920,* 62 I. C. C. 741 and 64 I. C. C. 751.

The rates from the western Kentucky field are made 35

cents over the rates from the southern Illinois group pursuant to the differential relationship prescribed by the Commission in *Illinois-Indiana Coal Cases*, 128 I. C. C. 265, and recently affirmed in *West Kentucky Coal Bureau* v. *Illinois Central Railroad Company*, 172 I. C. C. 279. This is explained on page 610 of the report of the full Commission. (R. 35.)

The rates from the various Indiana groups are closely related to the rates from the Illinois groups and are also differentially related to each other but in general these relations have not been fixed by the Commission. (Report of the full Commission, page 610 (R. 35)).

(b) *The Immediate Effect of the Milwaukee's Reductions in Rates Is a Splitting of the Origin Groups.*

The effect of the Milwaukee's reductions in rates from mines on its line in the Brazil-Clinton and Linton-Sullivan groups of 17 cents per ton to Rockford and Freeport, and lesser amounts to intermediate points, upon this highly important competitive rate adjustment is apparent from the foregoing description of the adjustment. The Commission found, page 619 of the report of the full Commission (R. 44) that the immediate effect of the proposed reductions would be a splitting of the Brazil-Clinton and Linton-Sullivan groups. There are numerous mines on other roads in those groups. Only 4 of the 23 mines in the Brazil-Clinton groups and 7 of the 40 mines in the Linton-Sullivan groups are on the Milwaukee, Exhibit 8 (R. 149). The Milwaukee urges that this is of small consequence because approximately 95 per cent of the coal moving from these groups to Rockford and Freeport moves from the mines on its line. Even so, we submit it is not likely that in a highly competitive adjustment such as the one here involved the lines upon which other mines in the two groups

are situated would permit the long existing competitive relationships to be distributed. The extension of the reduced rates to all mines in the respective groups was urged by the Indiana operators, represented by the Indiana Coal Trade Association (R. 102). The Commission commented, page 619 of the report of the full Commission (R. 44) on the likelihood of the extension of any reductions which might be made by the Milwaukee to the mines on other lines in the Brazil-Clinton and Linton-Sullivan groups.

(c) *The Milwaukee's Reductions in Rates Would Cause Corresponding Reductions in Rates from Other Groups in the Indiana Field.*

A more important immediate effect of the Milwaukee's proposals was that the proposed reductions would increase the differentials between the other groups in Indiana and the Brazil-Clinton and Linton-Sullivan groups 17 cents at Rockford and Freeport and lesser amounts at the intermediate points. Exhibit No. 43 (R. 217) showing shipments from various groups to Rockford shows that in 1931 and 1932 the Princeton and Boonville groups in southern Indiana combined shipped approximately the same amount of coal to Rockford as the Brazil-Clinton and Linton-Sullivan groups combined. Their differentials over the Brazil-Clinton or base group would be increased from 12 cents to 29 cents and from 15 cents to 32 cents, respectively. Excerpts from the testimony of the witness for the protesting railroads before the Commission, (the intervening railroad defendants before the District Court) to the effect that reductions in the rates from the other Indiana groups would be inevitable are quoted on page 616 of the report of the full Commission (R. 41). The Commission found, page 619 of the report of the full Commission (R. 44):

> "Such reductions would destroy the differential relations now existing as between those groups and the

other Indiana groups, with the probability of mines and carriers in such other groups seeking similar reductions."

The testimonly of the protestants' witness regarding the effect of the proposed reductions on the Indiana adjustment finds support in the testimony for the Indiana operators which was not referred to by the Commission in its reports. The Indiana operators were represented before the Commission by the Indiana Coal Trade Association whose membership mines produce 80 per cent of all of the coal mined in Indiana and 90 per cent of the coal shipped from the Brazil-Clinton and Linton-Sullivan groups over the Milwaukee (R. 90). Their witness, Mr. Jonas Waffle, Managing Director of the Association, testified (R. 102) that the reductions in rates from the mines on the Milwaukee in the Brazil-Clinton and Linton-Sullivan groups should be extended to all mines in those groups. He was of the opinion, however that the differential between the Linton-Sullivan and the Brazil-Clinton groups of 5 cents should be increased to 10 cents (R. 100, 107). In other words, it was the opinion of the representative of the Indiana operators that the reductions proposed by the Milwaukee from the Linton-Sullivan group which would preserve the differential were 5 cents greater than necessary. Aside from this change in the differential relationship between the Brazil-Clinton and the Linton-Sullivan groups, the witness for the Indiana operators thought the Indiana group relationships should be preserved (R. 102). The witness for the Milwaukee advocated the extension of the 17 cents reductions to the other Indiana groups (R. 90). This means the extension of the reductions from the Brazil-Clinton and Linton-Sullivan groups to the entire Indiana field, exactly what the witness for the protesting carriers before the Commission testified would happen.

(d) *The Milwaukee's Reductions in Rates Would Cause Corresponding Reductions in the Rates from the Illinois and Western Kentucky Fields.*

The Commission further found that the disruption of the rate adjustment would not be confined to the Indiana field but would spread to the Illinois field, stating, page 619 of the report of the full Commission (R. 44):

> "The reductions here proposed if permitted to become effective would result in a level of rates from the Indiana groups lower than that which we stated, in the *Illinois Case,* to be well below the reasonable level of rates in this territory, and would probably lead to further reductions in the Illinois intrastate rates with like reductions in the rates from western Kentucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by us, thus needlessly sacrificing the carriers' revenues and impairing their ability to render adequate and efficient railway transportation service."

It is necessary to go somewhat further into the relationships between the rates from the Indiana and the Illinois fields in order to appreciate the findings of the Commission on this point. Their history is outlined in the Commission's reports. It is explained on page 610 of the report of the full Commission (R. 35) that for many years prior to 1930 the coal rates from the Springfield group in Illinois and the Brazil-Clinton group in Indiana to the destinations here considered were maintained on a parity, with the rates from both groups 30 cents under the rates from the southern Illinois group. Histories of the rates and relationships are set out in two exhibits, Exhibit No. 2 (R. 144), introduced by the Milwaukee, and Exhibit No. 33 (R. 204), introduced by the Illinois Coal Traffic Bureau. Exhibit No. 2 begins with January 1, 1910. Exhibit No. 33 begins with April 1, 1913, and sets out in addition to the rates the differentials over or under southern Illinois in

cents per ton. It shows that the 30 cent differential Brazil-Clinton under southern Illinois, referred to in the report of the full Commission, was not established in connection with the rates to Freeport until July 19, 1925, and that prior to that time varying lower differentials had been maintained. At one time, July 1, 1917, the rates were the same. The differential prior to the taking effect of the Milwaukee's reduced rates under the injunction of the lower court was 13 cents. Page B of the exhibit, setting out the rates and differentials to Rockford, shows that the 30 cent differential, Brazil-Clinton under southern Illinois, was likewise not established until July 19, 1925, and that prior to that time varying lower differentials had been in effect, ranging as low as 15 cents on December 1, 1916 and 5 cents on July 1, 1917. It is apparent from these exhibits that the many years the 30 cent differential had been in effect were in reality only 5, and that prior thereto the differentials had varied and often been materially less than 30 cents.

It is true that the parity of the Brazil-Clinton group with the Springfield group has been of longer standing, but the important relationships are the relationships to the southern Illinois group. Indiana's real competition is with coal from the southern Illinois group (R. 102, 114, 140).

Both Exhibit No. 2 and Exhibit No. 33 show that prior to the differential of 13 cents which was established on August 20, 1930 by the reduction in the Illinois rates by order of the Illinois Commerce Commission (R. 74), and maintained by virtue of the decision of the Interstate Commerce Commission in the thirteenth section case, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, there had been no fixed and consistently maintained relationships between the rates from the Indiana and the Illinois groups. That particular rate litigation, however, had the effect of fixing for the first time relationships between the Indiana and Illinois groups as definite as the

relationships of the Indiana groups to each other and the relationship between the southern Illinois and western Kentucky groups. We believe that the decisions of the Illinois Commerce Commission and the Interstate Commerce Commission in those cases are of sufficient consequence to this proceeding to bear consideration in some detail.

The rates to northern Illinois from the Illinois groups apply principally over intrastate routes and are subject to the jurisdiction of the Illinois Commerce Commission. These Illinois rates were reduced 17 cents per ton in compliance with orders of the Illinois Commission, effective on August 20, 1930 in Illinois Commerce Commission Dockets 13568 and 13569 (R. 74). Appeals were taken from the Illinois Commerce Commission's orders. The appeal from the order in Docket No. 13568 reached the Supreme Court of Illinois and the order was affirmed in *A. T. & S. F. Ry. Co.* v. *Commerce Commission,* 335 Ill. 70. The court's opinion shows that one of the issues was whether the order of the state commission was invalid because in making its finding of unreasonableness it took into consideration existing rates on competitive interstate shipments. The Illinois Supreme Court took the position that the effect of the reduced intrastate rates on the interstate rates and interstate commerce was a matter for the Interstate Commerce Commission (pages 85, 100 of the court's opinion). After their failure to get the order of the Illinois Commerce Commission set aside by the court and the reduced rates were established, the Illinois railroads filed a petition with the Interstate Commerce Commission for an investigation under Section 13 of the Act (R. 75) alleging that the intrastate rates prescribed by the Illinois Commerce Commission were unduly prejudicial to interstate shippers and resulted in unjust discrimination against interstate commerce. Pursuant to this petition the Interstate Commerce Commission instituted the investigation generally referred to in this

proceeding as the thirteenth section case, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537. Numerous intrastate rates in addition to the rates to Rockford, Freeport and the other destinations involved in this case were involved in the thirteenth section case. The report shows that the Interstate Commerce Commission went extensively into the relationships between the intrastate and the interstate rates. A number of the intrastate rates, including the rates to Chicago, were found unduly prejudicial to interstate shippers and unjustly discriminatory against interstate commerce and required to be increased.

The finding in the thirteenth section case with respect to the relationships between the rates to Rockford and Freeport from the Illinois groups on the one hand and the Indiana groups on the other is set out and discussed on page 611 (R. 36) of the report of the full Commission in the instant case. The Commission found that the principal competition of the Illinois producers at these destinations comes from Indiana. The Commission considered the Illinois rates to be low but likewise found that the rates from Indiana were low and concluded that the Illinois rates could not be found unlawful under Section 13 of the Act until and unless the interstate rates from the Indiana groups to the same destinations were increased to a level more nearly commensurate with the general level of rates on coal in that territory. In this connection it should be noted that the statement in the dissenting opinion of Commissioner McManamy on page 622 of the report of the full Commission (R. 47) to the effect that the Commission had found the rates prescribed by the Illinois Commission not unreasonably low, is incorrect. The Commission *expressly found both sets of rates low but concluded that there was nothing unduly prejudicial or unjustly discriminatory in their relationships.*

In dealing with intrastate rates under the thirteenth sec-

tion the Interstate Commerce Commission deals primarily with relationships. *Florida* v. *United States,* 282 U. S. 194, 214. It therefore could not require the state rates to be increased, inasmuch as nothing was wrong with their relationships to the interstate rates. The decision of the Interstate Commerce Commission in the thirteenth section case constitutes a clear and definite holding that the relationships between the Indiana and the Illinois rates to Rockford and Freeport which were brought about by the 17 cent reduction prescribed by the Illinois Commerce Commission and have been disrupted by the Milwaukee's reductions in its rates, are just and proper relationships and, as we have stated, constitutes the approval for the first time of stable relationships between the Indiana and Illinois rates in this territory.

The Indiana operators contended before the Commission in the instant case that improper comparisons of distances had been used in the thirteenth section case (R. 97, 98). The Commission in the instant case reconsidered the question of distances on the record in the instant case and on page 614 of the report of the full Commission (R. 39) set out the distances which it considered proper. Upon these distances the full Commission concluded that the reduced rates proposed by the Milwaukee would precipitate general downward revisions of the rate structure and were unlawful.

The continued interest of the Illinois Commission and the Illinois operators in the relationships of the Illinois rates to the Indiana rates was manifested in the proceedings before the Commission in this case. The Illinois operators, represented by the Illinois Coal Traffic Bureau, the Springfield Illinois Coal Traffic Bureau and the Consolidated Coal Company, intervened as protestants before the Commission (R. 64, 69, 67) and introduced a considerable amount of testimony in opposition to the proposed reductions through

the witnesses Malum (R. 122) and Rozene (R. 114). The Illinois Commerce Commission's interest in the relationships it brought about by its 17 cent reduction in 1930 is evidenced by its protest to the Interstate Commerce Commission and by the fact that the case was heard jointly before Mr. R. M. Trezise, Examiner for the Interstate Commerce Commission and Mr. G. H. Shafer, of the Illinois Commerce Commission (R. 73). Can there be any doubt that if the reductions made by the Milwaukee in the rates from the Indiana groups are permitted to remain in effect, and the Illinois carriers do not voluntarily reduce the Illinois rates for competitive reasons, the Illinois operators will again complain to the Illinois Commission and that the Illinois Commission will prescribe like reductions to restore the relationships it brought about in 1930? Such a conclusion finds not merely substantial support in the evidence, but it is the only reasonable conclusion that can be drawn from the evidence.

Should the reductions made by the Milwaukee remain in effect permanently and the Illinois Commission prescribe like reductions, it is evident from the result of previous litigation over similar reductions prescribed in 1930 that the last resort of the Illinois roads would be to the Interstate Commerce Commission under the thirteenth section. The relationships before the Interstate Commerce Commission in such a thirteenth section case would be the same relationships that were before it in the prior thirteenth section case, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, which it was found did not violate the thirteenth section. The full Commission has concluded in the instant case that it should adhere to its findings with respect to the relationships in the prior thirteenth section case. It is therefore apparent, as the full Commission found, that the net result of the reductions proposed by the Milwaukee would be reductions in the rates from Illinois

to restore the August 20, 1930 relationships with no advantage secured by either the Indiana operators or the Milwaukee and the unnecessary and unwarranted loss by all of the carriers, including the Milwaukee, of revenue from traffic which is already moving on rates that are abnormally low. *We repeat that the decision of the Interstate Commerce Commission in the thirteenth section case materially altered the situation.* That decision for the first time stabilized the relationships between the Indiana and the Illinois rates and, as we have brought out in our discussion of the conflicting jurisdictions of the Interstate Commerce Commission and the Illinois Commerce Commission and their decisions with respect to these relationships, rendered the August 20, 1930 relationships predominant factors in the general rate adjustment which cannot be disturbed without far-reaching consequences.

The principal ground upon which the Milwaukee relied in its effort to justify its proposed reductions in rates from its mines in the Brazil-Clinton and Linton-Sullivan groups was that those reductions would merely restore the competitive relationships with the Illinois groups which existed prior to the 17 cent reduction made in the Illinois rates by the Illinois Commerce Commission on August 20, 1930 (R. 88). Restoration of the prior relationships was the announced purpose of the reductions (R. 74). This aspect of the case was stressed by the District Court in its opinion (R. 50). We submit, however, that it is obvious from what has been said that the circumstances under which the relationships prior to 1930 existed were entirely different from the present circumstances and that the effect of their restoration upon the general rate structure cannot be minimized on the plea that the changes in rates constitute merely the restoration of a pre-existing situation. The Interstate Commerce Commission appreciated fully the disastrous consequences which would follow the Milwaukee's restoration of

the prior relationships and the necessity of forestalling the reductions if the rate structure and the revenues of the carriers were to be preserved.

There is ample evidence to support the Commission's finding that the Milwaukee's proposed reductions in rates from the northern Indiana groups would bring about reductions in the rates from the Illinois groups aside from the jurisdiction of the Illinois Commerce Commission over the Illinois intrastate rates. There is keen competition in the destination territory involved between mines in the groups in southern Indiana and the mines in the southern Illinois group, Exhibit 43 (R. 217). The Commission recognized this and found, page 615 of the report of the full Commission (R. 40):

> "On the other hand, if the suspended rates are permitted to become effective, and the present differential of 15 cents over Brazil-Clinton group rate is maintained, the rate from the Boonville group to the destinations here considered would become 15 cents less than the rate from the southern Illinois group, although the distance is approximately 50 miles less from the latter group, thus tending to precipitate further reductions in the Illinois intrastate rates."

The competitive situation in and of itself endangers the Illinois rates if reductions in the Indiana rates are permitted.

So far as the rates from the western Kentucky field are concerned, it is only necessary to point out that those rates are maintained on a differential of 35 cents over the rates from the southern Illinois group prescribed by the Commission in *Illinois Indiana Coal Cases,* 128 I. C. C. 265 and recently affirmed in *West Kentucky Coal Bureau* v. *Illinois Central Railroad Company,* 172 I. C. C. 279, page 610 of the report of the full Commission (R. 35). The Commission found, page 619 of the report of the full Commission (R. 44), that reductions in the rates from Illinois would be followed by like reductions in the rates from western Ken-

tucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by it.

(e) *Reductions in Other Rates Which Would Be Caused by the Reductions Made by the Milwaukee Could Not Be Confined to the Destinations to Which the Milwaukee's Rates Apply, but Would Spread to Other Destinations in the Same Territory, Including the Important Chicago District.*

Up to this point we have been considering only the rates to Rockford, Freeport and the other points in northern Illinois to which the reduced rates of the Milwaukee apply. The reductions in rates, however, could not be confined to those particular destinations but would spread to the general territory. Chicago is by far the most important point in this territory, and, indeed, is of far more consequence than all of the other points in northern Illinois combined. In the thirteenth section case, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, the Commission prescribed a minimum intrastate rate from the Southern Illinois group to Chicago of $1.95 a ton (R. 43, 129). The present rates from the southern Illinois group to Freeport and Rockford are $2.00 a ton. If these rates were reduced by 17 cents per ton, either by the carriers voluntarily to preserve competitive relationships or by the order of the Illinois Commerce Commission, they would become $1.83. The witness for the protesting carriers further testified that there are routes from southern Illinois to Rockford and Freeport via Chicago over which the present rates apply (R. 129). In so far as these routes are interstate the rates are subject to the long-and-short-haul clause of the fourth section of the Interstate Commerce Act. In so far as they are intrastate the rates are subject to a similar provision of the Illinois Commerce Commission Act. (Chapter 111a,

Section 55, Cahill Illinois Revised Statutes, 1933). The Commission pointed out, page 618 of the report of the full Commission (R. 43), that it would be difficult to justify relief from the long-and-short-haul clause to maintain a rate to Rockford 12 cents lower than to Chicago, inasmuch as Chicago is a much more important market than Rockford and would at least be entitled to a rate no higher than the rate to Rockford. Relief via interstate routes would have to be secured from the Commission which has made this pronouncement. It is not likely that the Illinois Commerce Commission, in view of its natural concern for Illinois shippers and Illinois rates, and its action in prescribing the reductions in 1930, would permit the maintenance of a rate to Chicago higher than the rate to Rockford via intrastate routes. Furthermore, aside from the long-and-short-haul complications, how long would it be possible to maintain a rate to Chicago higher than the rate to Rockford for relatively the same distances from southern Illinois? It is true that the present intrastate rate from southern Illinois to Chicago is a minimum rate prescribed by the Interstate Commerce Commission in the thirteenth section case, but the order in that case does not prevent reductions in the interstate rates from either Indiana or Illinois. The Interstate Commerce Commission would find it difficult to refuse a modification of the thirteenth section order which would restore the relationships on which the intrastate rates prescribed by it were predicated. If the rates from the southern Illinois group to Chicago were reduced, corresponding reductions would have to be made in the rates from all other groups. The Commission took into consideration the probable effect on the Chicago rates, page 618 of the report of the full Commission (R. 43) and its action is amply sustained by the evidence.

(f) *The Findings of the District Court Are Directly Contrary to Those of the Commission on the Same Set of Facts and Cannot Be Sustained.*

We have gone thus at length into the evidence bearing on the effect on the general adjustment of coal rates into territory involved of the reductions in the Milwaukee's rates on account of the divergence in the conclusions reached by the Commission and by the District Court on the same set of facts. Summing up the general situation the Commission stated, page 616 of the report of the full Commission (R. 42):

> "In fact it would be difficult to conceive of a proposal more likely to precipitate unwarranted changes in a keenly competitive rate structure than that here proposed."

The District Court found (R. 56) that the Commission's findings were not supported by the evidence. The court's opinion shows (R. 51) that this conclusion was reached under the impression that the only evidence in support of the Commission's findings with respect to the disruption of the rate structure was the testimony of the witness for the protesting railroads, R. P. DeCamp, General Commerce Agent of the Illinois Central Railroad, who testified that in his opinion the results which have been outlined would be inevitable if the reductions in rates proposed by the Milwaukee were permitted, and other similar opinion testimony. An excerpt from the witness DeCamp's testimony is quoted in the report of the full Commission, page 616 (R. 41). The District Court's opinion shows on its face that its treatment of the testimony of this witness constituted a weighing of the evidence which is not within the province of the court, a point which will be discussed elsewhere. Assuming it were within the province of the court to weigh the testimony, the District Court did not give the

testimony of this witness the weight to which it was entitled. The court held:

> "We do not feel that a mere belief of a witness as to what may happen in the future, even if he be an expert, is entitled to much weight as evidence. The belief in this case does not appear to have been founded upon facts or scientific observation as is required of an expert in any other line before his opinion becomes competent. The finding of the Commission, however, appears to be based solely upon such expressions as to the future effect of the proposed rates of the Milwaukee." (R. 51).

The court was in error as to the basis of the witness' observations. The witness had spent nearly thirty years in the traffic department of the Illinois Central Railroad (R. 127). From 1922 to 1928 he was Assistant Coal Traffic Manager of that railroad charged with the making of freight rates on coal and coke and the defending of them before the Interstate Commerce Commission and the various state commissions. From August 24, 1931 to July 16, 1932, he was Coal Traffic Manager of the Illinois Central Railroad with general supervision over the road's coal and coke traffic, a position corresponding to that held with the Milwaukee Railroad by the Milwaukee's witness before the Commission, Mr. Averitt (R. 74). Witness DeCamp's testimony shows that he was thoroughly familiar with the rate situation presented to the Commission by the proposed reductions of the Milwaukee and that he was amply qualified to express an expert opinion on the effect on the rate structure of the Milwaukee's proposed reduced rates. That opinion was concurred in by the witness Malum for the Springfield Coal Traffic Bureau who testified (R. 127) that, based on his experience in the coal business, there is not any question but that the reductions from the Milwaukee mines in the Brazil-Clinton and Linton-Sullivan groups would spread to other railroads serving those groups and in time go on down to the southern part of Indiana. We

have previously brought out that the witness for the Indiana operators advocates the preservation of the long standing differential relationships among the Indiana groups, with a minor exception. The opinion of the witness DeCamp was further supported by the highly competitive nature of the rate adjustment and its history, both of which were fully reviewed by the Commission in its reports.

Had there been any conflict in the testimony on this point the Commission would have been amply justified in its finding that the proposal of the Milwaukee would result in unwarranted disruptions of the rate structure. But there was no real conflict in the testimony. The Milwaukee did not take the position before the Commission that the reductions in the rates proposed by it would not lead to reductions in other rates and the disruption of the rate structure. The answer of its witness to the question whether the rates if permitted to go into effect would disrupt the rate structure in the general territory was, "Let the future take care of itself" (R. 89). The witness advocated the extension of the 17 cent reduction to the other groups in Indiana (R. 90). The position of the Milwaukee was that it considered the proposed reductions necessary to protect its own individual interests and that other carriers would have to take care of themselves. That is perhaps a natural position for an individual railroad to take, but no such view can be taken by the Interstate Commerce Commission under the duties imposed upon it to preserve the general revenues of the carriers. Its finding that the proposed reduced rates of the Milwaukee would lead to unwarranted reductions in other rates and a general disruption of a most important rate structure was supported by the overwhelming weight of the testimony. The District Court was clearly in error in holding that these findings of the Commission were not supported by substantial evidence.

2. THE COMMISSION'S FINDING THAT THE PROPOSED REDUCTIONS WOULD RESULT IN THE UNNECESSARY SACRIFICE OF THE REVENUES OF THE CARRIERS IN GENERAL IS FULLY SUPPORTED BY THE EVIDENCE.

The Commission pointed out on page 621 of the report of the full Commission (R. 46) that under the Transportation Act of 1920, in which the minimum rate power was granted, there was imposed upon it the affirmative duty "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." The Commission further pointed out that, as this court recently held in *Florida* v. *United States,* 292 U. S. 1, the amendment of Section 15a (2) by the Emergency Transportation Act of 1933 discloses no intention to weaken national control for essential national purposes over the railway system of the country, but instead emphasizes the carriers' need of adequate revenues and was designed to aid that control in the light of the depressed economic condition of the railways.

In the preceding section of this brief we have brought out that the Commission's findings that the effect of the proposed reductions of the Milwaukee would be corresponding reductions of the rates in general throughout the territory affected are the only findings which could have been made upon the record presented to the Commission. The effect of such reductions on the revenues of the carriers in general is dealt with on pages 618 and 619 of the report of the full Commission (R. 43). It is brought out that, based on the coal tonnage to Rockford, the most important destination to which reduced rates were proposed, in 1932 from the Illinois, Indiana and western Kentucky fields, Exhibit No. 43 (R. 217) a 17-cent general reduction would result in an annual revenue loss to the carriers approximating $48,600.00. This item alone is of material

consequence in the light of the depressed economic condition of the railways. The losses in revenue on the traffic of the entire territory to which reduced rates were proposed would of necessity be much greater.

It has also been brought out in a preceding section of this brief that the Commission properly found that the destination territory to which reductions in rates would be made could not be restricted to Rockford, Freeport and the other destinations to which the reduced Milwaukee rates apply. The reductions would inevitably spread to other points in the general territory, including the Chicago district, one of the most important consuming points for coal in the entire country. The present rate from the Southern Illinois base group to Chicago is $1.95 a ton, prescribed by the Interstate Commerce Commission in the thirteenth section case (R. 129). The likelihood of the carriers being able to maintain higher rates to Chicago than to Rockford is slight, as the Commission found. A reduction of 17 cents in the present rate to Rockford from southern Illinois of $2.00 per ton would produce a rate of $1.83 per ton. Reduction of the Chicago rates to the Rockford basis would mean a general reduction in the Chicago rates of 12 cents per ton. The loss in revenue to the carriers in general from such a reduction would of necessity be tremendous. This was fully appreciated by the Commission, as it clearly indicated by pointing out, page 618 of the report of the full Commission, that it found in the thirteenth section case that a reduction of only 5 cents a ton on the annual tonnage which moved to Chicago in recent years would amount to more than $600,000.00 and that based upon the same tonnage a reduction of 12 cents per ton would have entailed an annual loss in revenue exceeding $1,400,000.00. The report in the thirteenth section case, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, 545, shows that the annual tonnage to Chicago referred

to was the tonnage from the Indiana, Illinois and western Kentucky fields. That case was submitted in December, 1931. After making full allowance for reductions in the consumption of coal since the case was submitted due to the depression it is still obvious that a 12 cent reduction could not be made in the rates to Chicago without entailing serious losses in revenue.

The Milwaukee conceded in its testimony (R. 74, 83, 90) that the rates to Rockford, Freeport and the other points involved, and, in fact, all of the coal rates in this territory, were unduly low. The Commission stated, page 617 of the report of the full Commission (R. 42), that it itself has recognized that the basis of rates on coal in Illinois territory is the lowest in the country, due to the intense carrier and commercial competition. This means that the coal traffic in this territory is already contributing a relatively small share to the maintenance of the general national transportation system. The Interstate Commerce Commission is properly concerned with any further reduction in the level of these rates and any further diminished contribution of this traffic to the maintenance of the national transportation system it is under the duty to foster and conserve. The Commission would have been remiss in this duty had it not taken the action which is now under review.

It is evident from the highly competitive situation and the prior decisions of the Illinois Commission and the Interstate Commerce Commission that the Milwaukee reductions will soon bring about corresponding general reductions in the rates from the other groups if permitted to remain in effect permanently and that even any advantage the Milwaukee may obtain will be short-lived. The Interstate Commerce Commission's finding that the proposed reductions, if permitted, would entail a serious and wholly unnecessary sacrifice of carrier revenues is amply supported by the record and the Commission's action to pre-

vent this loss in revenue pursuant to the duty placed upon it by the Commerce Act is valid and should be sustained.

The holding of the District Court (R. 53) that there is no evidence in the record that the proposed rates of the Milwaukee, if allowed to stand, would so affect the earning capacity of any other railroad as to prevent its earning a fair return misconceives the Commission's duty under the law and wholly ignores the testimony which we have reviewed. It is clearly in error.

3. THE COMMISSION'S FINDING THAT THE THEN EXISTING RATE RELATIONSHIPS HAD NOT RESULTED IN A DECREASED MOVEMENT OF COAL FROM THE INDIANA GROUPS TO THE DESTINATIONS INVOLVED IS SUPPORTED BY SUBSTANTIAL EVIDENCE. THE REDUCTIONS IN RATES PROPOSED BY THE MILWAUKEE WERE NOT NECESSARY TO ENABLE IT TO COMPETE FOR THE COAL TRAFFIC OF THE DESTINATION TERRITORY AND THE COMMISSION'S ORDER DID NOT DEPRIVE THE MILWAUKEE OF ITS RIGHT TO COMPETE.

The announced purpose of the Milwaukee in proposing reductions of 17 cents per ton in the rates from mines on its line in the Brazil-Clinton and Linton-Sullivan groups to Freeport and Rockford was to restore the relationships to the rates from Illinois mines which existed prior to August 20, 1930, when reductions of 17 cents per ton were made in the Illinois rates by order of the Illinois Commerce Commission. The Milwaukee contended below that the enforcement of the order of the Interstate Commerce Commission here involved would have the effect of depriving it of its right to compete for the coal traffic in this territory. We shall show that the record does not support this contention. To the contrary it shows that the Milwaukee has continued to compete successfully for the coal traffic of this territory under the rate relationships established on August 20, 1930,

and that there is no reason for assuming that it would not continue to compete with rates bearing the same relationships in the future.

So far as the evidence it placed before the Interstate Commerce Commission is concerned, the Milwaukee relied on bare assertions for sustaining its contention that the 17 cent reduction in the Illinois rates had prevented it from competing for the coal traffic in northern Illinois and that it was necessary to restore the prior relationships.

The protestants, however, introduced testimony which showed affirmatively that the change in the Illinois rates on August 20, 1930, did not have the effect of prohibiting the Milwaukee from competing, but on the contrary it has continued to compete since the change in rates just as it did before that date. The protestant Illinois Central Railroad Company introduced Exhibit No. 43 (R. 217), a statement showing in tons the amounts of coal received at Rockford from the various mine groups in Illinois, Indiana and western Kentucky during the years 1929 to 1932, inclusive. The exhibit begins with 1929, the last full year during which the relationships the Milwaukee was seeking to restore were in effect, and ends with 1932, the last full year for which figures were available at the time of the hearing in February, 1933. This exhibit constitutes definite and specific evidence of the effect the change in rates had on the movement of coal to Rockford and shows that the relationships of rates the Milwaukee sought to disrupt did not prevent the Milwaukee from competing. The exhibit is summed up as follows on page 613 of the report of the full Commission. (R. 38):

> "An exhibit, as corrected at the argument, introduced by the Illinois Central Railroad Company, protestant, indicates that the volume of coal moved to Rockford in 1932 from the southern Illinois group was 42.7 per cent of that moved in 1929, from the Springfield group 245 per cent, from the Brazil-Clinton group 39.6 per cent,

and from the Linton-Sullivan group 88.1 per cent, from all groups in Illinois 53.4 per cent, and from all groups in Indiana 87.7 per cent. The same exhibit indicates that the volume of coal moved to Rockford in 1931 from the southern Illinois group was 54.3 per cent of that moved in 1929, from the Springfield group 187.7 per cent, from the Brazil-Clinton group 58.4 per cent, from the Linton-Sullivan group 42.5 per cent, from all groups in Illinois 58.4 per cent, and from all groups in Indiana 88.7 per cent. The carrier used 1929 for this comparison because that was the first full year prior to the reductions in the Illinois intrastate rates. The increase in the tonnage of coal from the Springfield group to Rockford during 1931 and 1932 over the tonnage shipped in 1929 resulted from the distribution of coal for relief purposes at Rockford which coal was purchased at mines in the Springfield group because of the low prices prevailing in that group. This exhibit was introduced for the purpose of showing that, with the exception of the coal shipped from the Springfield group to Rockford for relief purposes, the decrease in the volume of traffic from the Indiana mines to the destinations here considered, during 1931 and 1932, compared with the 1929 traffic (the year prior to the reduction in the rates from the Illinois mines), was less than the decrease in the movement from the Illinois mines to the same destinations during the same period. On the record we are of the opinion that the percentage of the tonnage from the Indiana groups to the destinations herein considered during the period shown had not decreased as a result of the reduced rates from the Illinois groups."

The correction at the argument before the full Commission consisted of a statement by counsel for the Illinois Central that the contention of the Milwaukee at the argument before Division 2 of the Commission that in setting out the 1929 movement the Brazil-Clinton tonnage had been shown as the Linton-Sullivan tonnage and the Linton-Sullivan tonnage had been shown as the Brazil-Clinton tonnage had been investigated and found correct. This contention of the Milwaukee is referred to on page 247 of the report

of Division 2 in 197 I. C. C. (R. 9). The increased movement from the Springfield group on account of the use of the cheap Springfield coal for poor relief purposes was testified to by the witness Seaberg (R. 113), salesman at Rockford for one of the Illinois coal companies (R. 108). Aside from the transposition of the Brazil-Clinton and Linton-Sullivan tonnages for the year 1929, the Milwaukee does not contest the correctness of Exhibit No. 43. On page 6 of the bill of complaint (R. 4) the Milwaukee stresses the increased movement from the Springfield district. But this is due to the use of cheap Springfield coal for poor relief (R. 113), a condition not attributable to the freight rates. Furthermore, all witnesses agree that Indiana's real competition is with southern Illinois. (R. 102, 114, 140). Formal finding of fact IV (R. 55) made by the District Court refers to the increase in the movement from the Springfield group to Rockford and attributes it to the reduction in rates made by the Illinois Commission. The ignoring of the testimony regarding the use of Springfield coal for poor relief and the movements from the other groups specifically set out by the Commission are difficult to understand.

It was contended before the court below that Exhibit No. 43 cannot be relied upon as portraying correctly the effect of the change in rates on account of strikes at the mines in the year 1932, which caused the movement from Illinois to be abnormally low. There is no support in the record for such a position. Leaving out of consideration the year 1932 and referring only to comparisons of 1929 with 1931, we find, as the Commission states, that the movements of coal to Rockford in 1931 were the following per cents of the movements in the year 1929: from the southern Illinois group 54.3 per cent, from the Springfield group 187.7 per cent, from the Brazil-Clinton group 58.4 per cent, from the Linton-Sullivan group 42.5 per cent, from all groups in Illi-

nois 68.4 per cent, and from all groups in Indiana 88.7 per cent. Furthermore, comparing the 1932 tonnages from the Indiana groups with the 1931 tonnages we find that although the movement from the Linton-Sullivan group increased, the movement from the Brazil-Clinton group decreased and the total movement from both groups was less in 1932 than in 1931. There was a large increase in the movement from the Princeton group in southern Indiana in 1932 over 1931. While this may be partially attributable to the freedom from strikes in 1932 (R. 113), the principal reason was the transfer of certain mines from the Boonville group to the Princeton group (R. 133). Combining the tonnages for the two groups, we find that the movement in 1932 was 45,688 tons against 42,560 tons in 1931.

In addition to Exhibit No. 43 there was the testimony on behalf of the protestants of the witness W. M. Seaberg, salesman for one of the Illinois companies in Rockford, Freeport and the surrounding territory (R. 108). Mr. Seaberg testified to the general effect that there was still keen competition between Indiana and Illinois coals in this territory (R. 109) and that while the movement of all kinds of coal to both Rockford and Freeport has decreased materially in the past four years, the decrease in southern Illinois coal has been a great deal larger than the decrease in Indiana coal. Mr. Seaberg gave instances of companies which have changed from Illinois coal to Indiana coal (R. 110). The testimony of the witness Leahy, Vice President of the Binkley Coal Company, one of the Indiana operators, was principally in rebuttal of the testimony of the witness Seaberg. He stated that his company's principal customer at Rockford was the Rockford Electric Company (R. 139) and gave the circumstances surrounding the contract in some detail. Recently there had been a decrease in the consumption of coal by this plant due to a new hook-up under which a part of the power is supplied from the electric

plant at Waukegan, Illinois. This, of course, is not attributable to the freight rates. Mr. Leahy further testified that changes by consumers from one coal to another are rather frequent occurrences in recent years (R. 140).

The only conclusion which could possibly be drawn from the testimony of the witnesses Seaberg and the witness Leahy is that there has been keen competition between Indiana and Illinois coals in the territory in northern Illinois here involved and that it cannot be contended that the relationships in freight rates the Milwaukee sought to disrupt have shut the Indiana operators out of this market or unjustly deprived the Milwaukee of its coal traffic. The Milwaukee was freely competing under the then existing relationships, and it is obvious, as was found by the Commission on page 612 of the report of the full Commission, that the proposed reduced rates reestablish the advantage the Indiana groups had over their Illinois competitors prior to the reduction in the Illinois rates in August, 1930. The proposed reductions were such reductions as the Commission correctly concluded would precipitate counter-reductions from other groups to restore relationships with the net result of generally lower revenues from traffic already moving on a subnormal level of rates.

III.

THE DISTRICT COURT EXCEEDED ITS PROPER AUTHORITY AND JUDICIAL FUNCTION IN ENTERING UPON A DETERMINATION UPON CONFLICTING EVIDENCE OF THE FACT QUESTIONS PRESENTED IN THE CASE BEFORE THE COMMISSION AND THUS USURPED THE ADMINISTRATIVE FUNCTION OF THE COMMISSION.

It is the settled rule of law that whether upon the consideration of the same testimony the court would have reached the same conclusion as the Commission is not a question

for judicial determination. It is not within the province of the court to weigh the testimony or substitute its judgment for that of the Commission. *Manufacturers Ry. Co.* v. *United States,* 246 U. S. 457, 482, *New England Divisions Case,* 261 U. S. 184, *Western Paper Makers Chemical Company* v. *United States,* 271 U. S. 268, *Florida* v. *United States,* 292 U. S. 1. Even a casual examination of the opinion of the District Court will show that the court did weigh the evidence, substitute its judgment for that of the Commission, and, in short, deal with the case generally as if it were determining what order it would have entered had the case been decided by the court in the first instance.

Much of the testimony before the Commission was addressed to the effect of the Milwaukee's proposal upon the general rate adjustment. This evidence has been reviewed in a preceding section of the brief. Upon it the Commission found that the reductions in rates proposed by the Milwaukee would lead to wide spread and unwarranted reductions in the general rate structure. The District Court held that the findings of the Commission on this point were based solely upon expressions of opinion of witnesses as to the future effect of the proposed rates of the Milwaukee similar to the expression of opinion of the protestants' witness DeCamp, quoted from by the Commission on page 616 of the report of the full Commission (R. 41).

The testimony in question was to the effect that wide spread reductions in rates would be inevitable. The District Court held with respect to this testimony (R. 51):

> "We do not feel that a mere belief of a witness as to what may happen in the future, even if he be an expert, is entitled to much weight as evidence. The belief in this case does not appear to have been founded upon facts or scientific observation as is required of an expert in any other line before his opinion becomes competent."

This is an express weighing of the testimony. Further-

more, the court was in error as to the witness's qualifications and the competency of his testimony. He had had many years of experience in making rates, held responsible positions with the Illinois Central Railroad which involved especially the making and defending of rates on coal, and was thoroughly familiar with the rate adjustment involved and its history (R. 127). The Commission was dealing in this case with the probable effect of the Milwaukee's proposals on the general rate structure. Evidence as to what may happen in the future of necessity consists of expressions of opinion by competent witnesses. It is not within the province of the court to disagree with the Commission merely because this court gives less weight to the testimony than the Commission did.

Furthermore, the District Court was in error in disregarding altogether the highly competitive nature of the rate adjustment involved and its history, including the reductions in the Illinois rates ordered by the Illinois Commerce Commission and the litigation before the Interstate Commerce Commission with respect to the relationship between the Illinois and Indiana rates in the thirteenth section case, all of which were stated by the Commission in its reports with unusual care. It was not within the province of the court thus to ignore important evidence upon which the Commission expressly relied.

The substitution by the District Court of its judgment for that of the Commission is clearly indicated by its passing upon points which were not passed upon by the Commission and its stressing of aspects of the case to which the Commission attached little or no consequence.

For example, the District Court held in its opinion (R. 51):

> "There seems to be no question but that the Milwaukee is in a position to serve the mines in the Brazil-Clinton and Linton-Sullivan groups which are on its

lines at a much cheaper rate than other carriers whose lines touch coal mines in the same vicinity and more cheaply than the lines in Illinois can carry from the northern Illinois and Springfield groups to Rockford and Freeport."

There was no evidence before the Commission with respect either to the cost of the Milwaukee in handling coal from its mines in the Brazil-Clinton and Linton-Sullivan groups or the cost of other carriers in handling coal from their mines in those groups. It did appear that the Milwaukee had a single line route from the mines on its road and that the distances from many of its mines are shorter than the distances from other mines, but these are by no means the only elements in the cost of transporting traffic. There was no evidence whatsoever bearing on the costs of other carriers of transporting coal from mines in the Illinois groups and no basis for a comparison of costs or the formation of a conclusion as to whether or not the differences in rates properly reflected differences in costs. The Commission made no finding on the point, but there was no concession, either on the part of the Commission or on the part of the protesting railroads, that the costs of the Milwaukee were actually or relatively less than the costs of other carriers. Furthermore, had it been shown and had the Commission found that the costs of the Milwaukee were actually or relatively less than the costs of other carriers, such a finding would not have invalidated the Commission's order. The question being determined by the Commission was the effect of the Milwaukee's proposal upon the general rate structure and the revenues of the carriers as a whole. This does not depend upon whether either the rates proposed by the Milwaukee or the reduced rates of the other carriers which the Milwaukee's reductions would bring about would yield something more than the cost of handling the traffic. Such a test was rejected by the Commission in one of its first decisions dealing with the minimum rate

power. In *Ex Lake Iron Ore from Chicago to Granite City*, 123 I. C. C. 503, after stating that it is not enough merely to show that the proposed rates would result in gain rather than loss to the publishing carrier the Commission said, page 504:

> "But our authority, in our opinion, goes further. We are justified in condemning a proposed rate as too low if the evidence warrants the conclusion that it will, because of its lowness, tend to precipitate changes in rate structure or in traffic which will be harmful to the public interest, having in mind our responsibility for railroad earnings in general under section 15a."

It was argued in *Jefferson Island Salt Mining Co.* v. *United States*, 6 Fed. (2d) 315, that the Commission exceeded its power in prescribing a minimum rate because it had not been shown that the existing rate which that minimum rate required to be increased was non-compensatory or in itself unreasonably low from the carrier's viewpoint. The court pointed out, page 318 of the opinion, that such a rule would cut the heart out of the 1920 amendments to the Interstate Commerce Act. This is obviously correct. An adequate national transportation system cannot be maintained on a system of rates which, if prescribed by a regulatory body, would be barely above the red line of confiscation. The absence of a determination of whether or not the rates were non-compensatory is stressed in other portions of the opinion of the District Court. The District Court was clearly in error in considering whether or not the Commission should have made other findings of fact. The question for its determination was whether or not the findings of fact the Commission did make supported the order and in turn were supported by the evidence.

That the District Court substituted its judgment for that of the Commission is further indicated by the following statement in the opinion (R. 52):

> "There is no evidence in the record that the present

> rate structure is fair or that it is reasonable; no evidence that its disruption would necessarily lead to the introduction of unfair or unreasonable rates. Further, that situation is within the control of the Commission. It is not necessary that it sanction other changes of rates, if such new rates are below a reasonable minimum, or are non-compensatory."

The court was clearly in error with respect to the fairness and reasonableness of the present rate structure. We have shown in dealing with the history of the adjustment that the Commission brought out in its report that the present structure has been before it in many cases and has either prescribed or approved it in practically all of its important aspects, and particularly with respect to the relationship between the Indiana and Illinois rates in the thirteenth section case. The Milwaukee conceded and the Commission found, as it had in other cases, that the rates were well under reasonable maximum rates. The point we wish to emphasize here, however, is the conclusion of the District Court that the Commission should not exercise its minimum rate power at this time but wait until other reductions in rates are made and then determine whether those rates are reasonable minimum rates. It was not for the court to say how the Commission shall exercise its minimum rate power. Its province was to determine whether the manner in which the Commission did exercise its power was valid. We submit that the Commission was obviously correct in dealing with the unwarranted disruption of the rate structure in its inception and not waiting until other reductions had followed and its actions would be seriously hampered by the mere fact it had permitted the Milwaukee's reductions and the conflict between its jurisdiction and the jurisdiction of the Illinois Commerce Commission over the Illinois intrastate rates.

It is clear from the face of the opinion of the District Court that the court undertook to weigh the evidence and

substituted its judgment for that of the Commission. The general effect of sustaining the decision of the District Court would be to permit rate relationships and ultimately the level of the rates to be determined by the carriers under the protection of the court rather than by the Commission as the law provides.

IV.

THE COMMISSION'S ORDER DOES NOT UNFAIRLY DISCRIMINATE AGAINST THE MILWAUKEE AND IS NOT ARBITRARY IN THAT IT IMPROPERLY DISREGARDS THE DISTANCES FROM THE MILWAUKEE'S MINES.

1. THE COMMISSION'S ORDER DOES NOT DISCRIMINATE AGAINST THE MILWAUKEE BY PROHIBITING IT FROM COMPETING FOR THE TRAFFIC INVOLVED AND DOES NOT CONSTITUTE AN UNWARRANTED INTERFERENCE WITH THE MILWAUKEE'S MANAGERIAL DISCRETION WITH RESPECT TO THE PUBLICATION OF COMPETITIVE RATES.

The District Court made a formal finding of fact (R. 56) that the Commission's order was unfair and discriminated against the Milwaukee. In its opinion the District Court said with respect to the right of the Milwaukee to publish competitive rates (R. 52):

> "Further, the Milwaukee has the right within the zone of reasonableness to adopt such rates as will enable it to obtain or retain desired traffic for its own lines. *Texas and Pacific Railway Company* v. *United States, Supra.*"

Preceding this statement, the District Court had said (R. 51):

> "The carrier has a right to initiate rates. *United States* v. *Illinois Central Railroad Company,* 263 U. S. 516. There is no presumption that a rate so initiated is unreasonably low."

There can be no doubt about the right of a carrier to ini-

tiate rates for competitive or other reasons, but there also can be no doubt that the rates when initiated are subject to the Commission's power of review and regulation under Section 15 (7) and the other sections of the Act. *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515, cited by the District Court does not support any proposition that a carrier is unlimited in its right to initiate and maintain rates for competitive purposes. The court evidently relied on the following statement on page 522 of the opinion in that case:

> "A carrier is entitled to initiate rates and in this connection to adopt such policy of rate-making as to it seems wise."

The case involved the policy of the Illinois Central Railroad of maintaining for purely competitive reasons lower lumber rates from points on its own line than it was willing to concur in from points on lines of its connections. The practice was condemned under Section 3 of the Act prohibiting undue prejudice. Referring to the Transportation Act of 1920 this court said in that case, page 525:

> "In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. *For now, the interests of the individual carrier must yield in many respects to the public need, Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable.*" (Italics ours.)

The other case cited by the District Court in support of its position with respect to the right of a carrier to initiate rates to meet competition is *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627. This is the so-called

Galveston case in which an order of the Interstate Commerce Commission dealing with export and import rates under Section 3 of the Act was held void on two grounds, first, that a port is not a locality within the meaning of Section 3 (1), and, second, that the carriers against which the order was directed did not have such effective control over the rate situation as to enable them to remove the undue prejudice by their own act. The District Court was evidently relying upon a statement on page 636 of the opinion with respect to the maintenance of competitive export and import rates to and from competing ports, which is as follows:

> "As the carriers are in competition for the business they may, within the zone of reasonableness prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines."

A footnote referring to the term "zone of reasonableness" reads:

> "Since 1887, section 1 has forbidden that an export or import rate be unreasonably high; and since the Transportation Act, 1920, the Commission has been charged to see that the rate be not so low as to render the receipts of the business unremunerative."

This footnote, and other statements in the opinion, indicate that what the court had uppermost in its mind with respect to the lower limit of the zone of reasonableness in that case was whether or not the rates were compensatory. That does not mean, however, that that is the only test for determining whether a rate is below the lower limit of the zone of reasonableness. There was no suggestion of a rate war in that case. It was the order of the Commission which would have changed the existing situation, and not rates initiated by the carriers. The Commission's order was entered solely under Section 3 of the Act and not in the exercise of any minimum rate power, as stated by the court on page 650 of the opinion.

The decisions reviewed under the section of this brief dealing with the minimum rate power of the Commission clearly recognize that rates which would bring about unwarranted reductions in the general rate structure and the unnecessary dissipation of the carriers revenues, thereby endangering the maintenance of an adequate national transportation system, are unreasonably low and therefore not within the zone of reasonableness, as well as being in violation of section 15a (2) of the Act. It was specifically held in *Jefferson Island Salt Mining Co.* v. *United States,* 6 Fed. (2d) 315, that the Commission is not obliged to find a rate non-compensatory before suspending it as unreasonably low and prescribing a higher minimum rate. In *Mississippi Valley Barge Line Co.* v. *U. S.,* 292 U. S. 282, this court referred, page 287 of the opinion, with evident approval to the Commission's sedulous endeavor to guard against a rate war that would end in mere oppression.

The evidence showed and the Commission found (R. 39) that the Milwaukee was participating freely in the transportation of coal to the destination territory involved, a point which has been covered in a preceding section of this brief. There is a wide difference between prohibiting a carrier which has not been able to participate in a particular traffic from initiating rates which would enable it to participate and preventing a carrier which is already freely participating from making reductions in rates which will give it further advantages and precipitate like reductions in the rates of competing carriers.

2. THE COMMISSION DID NOT ARBITRARILY DISREGARD THE DISTANCES FROM THE MILWAUKEE MINES AND DID NOT UNJUSTLY REQUIRE THE CANCELLATION OF RATES RELATIVELY HIGHER, DISTANCE CONSIDERED, THAN THE RATES IN WHICH THE MILWAUKEE WAS COMPELLED BY THE ILLINOIS COMMERCE COMMISSION TO JOIN WITH OTHER RAILROADS FOR THE MOVEMENT OF COAL FROM ILLINOIS MINES TO DESTINATIONS IN NORTHERN ILLINOIS.

The District Court made a formal finding of fact, finding No. VI, (R. 55) that the rates proposed by the Milwaukee in the tariff ordered to be canceled were relatively higher, distance considered, than the rates in which the Milwaukee was compelled to join with other railroads for the movement of coal from Illinois mines to the destinations in northern Illinois. The court's opinion does not disclose clearly that in making this finding of fact the court took into consideration only the distances from the mines on the Milwaukee in the origin groups. Statements in the opinion, however, indicate that what the court had in mind was the distances from the mines on the Milwaukee alone. For example, it said (R. 51) that the Milwaukee was in a position to serve mines in the Brazil-Cinton and Linton-Sullivan groups on its line at a much cheaper rate than the other carriers whose lines touched coal mines in the same vicinity and more cheaply than the lines in Illinois can carry coal from the northern Illinois and Springfield groups. It has been brought out in a previous section of this brief that the record would not support a finding as to the relative costs of any of the carriers involved and that no such finding was made by the Commission. The District Court further stated in its opinion (R. 53) that there is nothing in the act authorizing the Commission to compel a carrier to charge a higher rate in order to favor other mines less favorably located, or to

increase the revenue of other carriers having a less direct route to the destinations involved. This likewise indicates that the court was considering distances from the Milwaukee mines alone.

The Milwaukee contended before the Commission and before the District Court that inasmuch as reductions from mines on its line alone were proposed the Commission could consider only rates and distances from the Milwaukee mines and the individual interests of the Milwaukee (R. 82, 87). The Commission is under the duty of fostering and preserving the national transportation system and can take no such narrow view of the case, but in passing upon the reductions proposed must take into account the general rate structure of which they are a part and the effect they would have upon it.

The present Brazil-Clinton and Linton-Sullivan rates are group rates applying from all points in those groups and have long been so maintained. While the reductions proposed by the Milwaukee apply only from mines on its line, the record shows that like reductions would be made from the mines on other lines in those groups, in which reductions the Milwaukee is willing to join. (R. 90.) The proposed rates can properly be considered as group rates and not merely as point to point rates from mines on the Milwaukee. The Indiana Coal Trade Association took no such narrow view of the case as the Milwaukee did, but took the position (R. 91) that the proposed reductions could be justified for application from all mines in the Brazil-Clinton and Linton-Sullivan groups and its exhibits show average distances from all mines in those groups as well as the distances from the Milwaukee mines alone.

The witness for the Milwaukee contended (R. 78) that the proposed rates of the Milwaukee were relatively higher than rates it was required by the orders of the Illinois

Commerce Commission to join in with other carriers from the Springfield and southern Illinois groups and the District Court so found in the finding to which we have referred. The Commission did not arbitrarily disregard this contention. It is discussed in the report of the full Commission and the Commission, referring first to the use of the average distances previously set out in the report, there stated (R. 39):

> "The Milwaukee objects to the use of the average distances as shown in the above table. It contends that the distances should be computed over its direct route and only from the mines on its line. For example, from mines on its line in the Brazil-Clinton group, the average distance over its direct route to Rockford is 231 miles. It compares the proposed rate of $1.70 from the Brazil-Clinton group to Rockford for 231 miles with a like rate from the Springfield group to Rockford for the average distance from all origins and over all routes, in an attempt to prove that the proposed rate from the Brazil-Clinton group is higher, distance considered, than the rate from the Springfield group. Such a comparison is worthless because like things are not compared. If the short tariff distances from mines on the Illinois Central in the Springfield group were used in comparison with the distance of 231 miles from mines on the Milwaukee in the Brazil-Clinton group, the comparison would favor the Springfield group from which the short tariff distance to Rockford is 199 miles. Such a method of computing distances would tend to destroy all groupings and cannot be adopted."*

As the Commission pointed out, average distances should be used, but if distances from only those mines on certain roads in the various groups are compared there are comparisons which favor the rates from the mines in the Illi-

* The importance of the group method of making rates on coal is indicated by the following cases before the Interstate Commerce Commission in additional to those referred to in the Commission's reports in this proceeding: *Intrastate Coal Rates to East St. Louis*, 161 I. C. C. 371, 379. *Intrastate Rates on Bituminous Coal Within Ohio*, 192 I. C. C. 413, 450, *Central Coal Producers' Assn.* v. *B. & O. R. R. Co.*, 196 I. C. C. 203, 227, *Lake Cargo Coal Cases, 1930*, 181 I. C. C. 37, 51, *Royal Route Co.* v. *A. G. S. R. R. Co.*, 182 I. C. C. 85, *Corporation Commission of North Carolina* v. *Aberdeen & R. R. R. Co.*, 200 I. C. C. 571.

nois groups as well as those which favor the Milwaukee's proposed rates from its mines in Indiana stressed in its testimony.

The Commission has selected from the record and set out on page 614 of the report of the full Commission (R. 39) the rates and average distances from the principal groups involved, the Springfield, southern Illinois, Brazil-Clinton and Linton-Sullivan groups. Obviously the Commission could not embody in its report all of the hundreds of distances in the various exhibits and it cannot be assumed that merely because a distance was not mentioned it was not considered. Each of the rate witnesses who testified introduced a series of exhibits in which rates and average distances from the important groups were set out. For example, average distances from the Brazil-Clinton group to Rockford are shown in Averitt's Exhibit No. 3, (R. 145) Waffle's Exhibit No. 10 (R. 159), Rozene's Exhibit No. 27 (R. 183) and DeCamp's Exhibit No. 40. (R. 215.) These exhibits likewise show rates and distances from other groups. The exhibits introduced by the witness Malum, Exhibits Nos. 34 to 37, inclusive, (R. 206-213) show average distances from the Springfield group. The average distances shown by the different parties vary somewhat and are conflicting in many respects, but generally speaking, the discrepancies are not sufficient to be of vital importance. Much of the testimony, however, was taken up with disputes over methods of figuring average distances. The Commission has selected the average distances via the short tariff routes, *i. e.*, the average distances via the shortest routes via which the rates actually apply and not via the shortest possible routes. This method of figuring distances was approved by the Indiana operators (R. 104). The witness for the Milwaukee referred to the practical impossibility of determining the average distances via the shortest possible routes over which carload traffic might be interchanged. (R. 77)

Rates on coal have not been made on distance alone, as the record in this case demonstrates, and cannot be so made. The witness for the Indiana Coal Trade Association correctly stated (R. 108):

> "Well, distance is not the controlling factor. You have got to remember that in making rates on a natural resource, that must be produced where God Almighty laid it down. You cannot observe mileage. There are competitive conditions that must be taken into consideration, in making the rates on coal. There is absolutely no consistency in the coal differentials. Go down through the volumes of the Interstate Commerce Commission, and you can find anything you want; you can get a 15-cent differential for 215 miles. There is no consistency in them. I do not believe anybody knows the real science of figuring out what a differential should be. I have never found it, at least.'

This court has recognized that distance is only one element to be considered in the fixing of rates. *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541, 551; *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 111. The Commission's report shows that it has given every consideration to the element of distance to which it is entitled in this highly competitive group rate adjustment:

It is true that the Commission did not deal with the case solely from the point of view of the Milwaukee. It took into consideration the effect of the Milwaukee's proposals on the general rate structure and the earnings of the carriers as a whole. Had it done otherwise the Commission would have been remiss in the duty which this court had repeatedly held was imposed upon it by the Transportation Act, 1920, and recently held was in nowise diminished by the amendment made by the Emergency Transportation Act of 1933. The action which the Commission took in this case in the performance of that duty was by no means arbitrary or unreasonable.

Conclusion.

The Interstate Commerce Commission's order enjoined by the court below constituted a valid exercise of the Commission's power under the Interstate Commerce Act to prohibit the establishment of unreasonably low rates which would disrupt an important existing rate structure and result in a serious and unwarranted dissipation of the revenues of the carriers in general which the Commission is under the duty to conserve. The drastic reductions of rates conceded by the Milwaukee and found by the Commission to be already low were not necessary to enable the Milwaukee to compete for the coal traffic to Rockford, Freeport and the intermediate points and, if permitted to continue in effect, will be followed by general reductions throughout the rate structure. The coal traffic in the Indiana and Illinois territory is of paramount importance to the carriers in this territory in general and particularly to the carriers on whose behalf this brief is filed. It constitutes one of their most important sources of revenue. The Commission was clearly under the duty of that taking the steps to preserve the carrier's revenues and to insure the maintenance of an adequate national transportation system it took in this proceedings. The Commission's findings of fact are adequate to support the order based thereon, and are in turn fully supported by the evidence. The decree of the court below should be reversed.

Respectfully submitted,

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Chicago, Illinois,
Dec. 18, 1934.

APPENDIX.

The Interstate Commerce Act, U. S. C. Title 49, provides:

Sec 1(5)

"(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *"

Sec. 15(1)

"(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and

to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Sec. 15(7)

"(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation

of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

Sec. 15a(2), as enacted in the Transportation Act of 1920, 41 Stat. L. 488,

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: PROVIDED, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable and to prescribe different rates for different sections of the country."

Sec. 15a(2) as amended by the Emergency Transportation Act, 1933, 48 Stat. L. 220,

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due

consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service."